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CALIFORNIA DENTAL ASSOCIATION: NOT A QUICK LOOK BUT NOT THE FULL MONTY

STEPHEN CALKINS*

Some cases can be understood only in context. Law students are taught to distinguish holdings from dictum, but lawyers and judges alike need regular refresher courses on this fundamental point. Facts and outcomes, not judicial phrasings, make the law. To understand some cases fully requires knowing more than the facts and the outcome; it requires knowing what the case was really about—what issues were presented to appellate courts, what arguments were persuasive, and, sometimes most especially, what arguments failed to carry the day.

*California Dental Association v. FTC*¹ is a case that singularly illustrates these observations. More than most opinions, *CDA* can be understood only in context. The story of the *CDA* litigation is essential to an understanding of the Court's opinion. That story also teaches valuable lessons about administrative and appellate adjudication, and helps to explain how the Supreme Court could write such a disappointing opinion.

Three issues were vigorously contested in *CDA*. The first issue concerned the FTC's jurisdiction over nonprofit associations. An FTC defeat on this issue would have had serious consequences for the Commission, but the FTC prevailed on terms even more favorable than it had sought. The Supreme Court has now shined a powerful spotlight on the anticompetitive potential of these associations.

The second issue concerned the place in antitrust of the full-blown rule of reason. Here the question was whether conduct short of classic per se violations can be condemned without formal proof of market

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¹ 119 S. Ct. 1604 (1999) (*CDA*).

power, complete with market definitions, economics testimony, measurement of entry conditions, and the like—the antitrust Full Monty.² Here, too, an FTC defeat would have had serious consequences, not just for the Commission but for all of antitrust; but the FTC prevailed. (To be sure, the Supreme Court disapproved of the way it believed the Ninth Circuit had applied “quick look” antitrust review, but the Court remanded for further proceedings without calling for full-blown rule of reason review.)

The third issue concerned professional advertising and the hostility with which regulators should view industry self-regulation. On this issue only, the FTC lost. That defeat has sent the Commission back to rethink professional advertising and to reexamine the empirical evidence of the effect of self-regulation in *CDA*. The defeat is a vivid reminder of the discomfort with which several members of the Supreme Court view professional advertising. Contrary to the views of some commentators, however, it teaches little about more general antitrust issues.

The story of *CDA* and the lessons that can be drawn from it are unusually complicated. To examine them, this article sketches an overview of the dispute at issue and the various opinions, and then turns to jurisdiction. The Supreme Court here adopted a nebulous standard more aggressive than that used or advanced by the Commission, all the while claiming that it was following the Commission’s views. The article then examines the antipathy to professional advertising evinced by the Court majority. The Court lent a sympathetic ear to arguments that had not been advanced below and that are not likely to prove persuasive in a different context.

The most important lesson of *CDA* is that the defendant’s³ principal argument throughout the proceeding—that the Commission could prohibit its restraints only through elaborate, formal proof of market power—was rejected. As context, the article reviews the origin and derivation of the flexible rule of reason. It shows that *CDA* is a setback for what could be known as the “quick look movement,” but also is a setback

² See *London Slang* <<http://www.geezer.demon.co.uk>> (“full monty—‘the whole lot,’ ‘all that is desired.’ There are a few meanings proposed for the phrase ‘the full monty,’ but the most commonly accepted one is that it comes from a gambling term where the ‘monte’ (Spanish for mountain) is the kitty or ‘pot’ of money in the middle of the table. This has been changed to the spelling ‘monty.’”); *A Dictionary of Slang* <<http://www.peevish.u-net.com/slang/f.htm>> (“The complete amount. The *Monty* can possibly be spelt with a capital M.”). Thanks to Charles Lister for directing me away from the delightful film to these authorities.

³ The party against whom an FTC administrative complaint is filed is known as a “respondent,” but for ease of reading, this article will use the more familiar term, “defendant.”

for market power screens. Finally, the article applauds CDA's call for application of a "sliding scale" of antitrust analysis. The CDA litigation itself exemplifies some of the problems associated with alternative approaches, including categorizations, such as "inherently suspect," "non-naked restraints," "quick looks," "facially suspect," and "plausible efficiencies." The article ends with preliminary thoughts about applying a sliding scale of antitrust analysis.

I. BACKGROUND AND SUMMARY OF OPINIONS

A. THE CDA DISPUTE

As summarized by the Supreme Court and the Court of Appeals for the Ninth Circuit (on whose recitation the Court relied), CDA's facts have a surface straightforwardness. CDA is a voluntary, nonprofit association to which approximately 75 percent of California's practicing dentists belong. All members agree to abide by a Code of Ethics that, among other things, requires dentists to "represent themselves in a manner that contributes to the esteem of the public" and prohibits "false or misleading" advertising.⁴ This Code has been supplemented by advisory opinions⁵ and guide-

⁴ Section 10 of the Code is as follows:

Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect.

California Dental Ass'n v. FTC, 128 F.3d 720, 723 (9th Cir. 1997); 119 S. Ct. at 1608.

⁵ The CDA Judicial Council may issue advisory opinions setting forth its interpretations of the Code's principles. Although not binding interpretations, the opinions "may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws." 128 F.3d at 723 n.1 (quoting the preamble to the Code).

Among issued advisory opinions relating to advertising are the following:

2. A statement or claim is false or misleading in any material respect when it:
 - a. contains a misrepresentation of fact;
 - b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
 - c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;
 - d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;
 - e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.
3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.
4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, "low fees"—must be based on verifiable

lines.⁶ The Commission's challenge alleged that, as interpreted and enforced, CDA's advertising restrictions had the effect of substantially chilling price and quality advertising, to the detriment of consumers.

B. THE INITIAL DECISION

The Commission's complaint, issued unanimously on July 9, 1993,⁷ seemed simple enough. It alleged that the CDA, which included "approximately 75% of the practicing dentists in California," had restricted its members' advertising of prices and quality, "without regard to whether such advertising is truthful and nondeceptive."⁸ The complaint alleged that these restrictions "had, or have, the tendency and capacity to restrain competition unreasonably and to injure consumers" by depriving consumers of information, raising consumer costs, and lessening innovation.⁹ The agreed-to restrictions allegedly violated Section 5 of the FTC Act.¹⁰ No mention was made of market power.

A year and a half of discovery led up to a two-week trial.¹¹ Almost exactly two years after the complaint was issued, now-retired Administrative Law

data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity.

8. Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.

Id. at 723-24 (quoted at 119 S. Ct. at 1608 n.1).

⁶ According to the court of appeals, CDA's advertising guidelines declare that California state law "requires dentists offering discounts to list all of the following in the advertisement:

1. The dollar amount of the nondiscounted fee for the service;
2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service;
3. The length of time that the discount will be offered;
4. Verifiable fees; and
5. Specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount."

128 F.3d at 724 (quoted at 119 S. Ct. at 1608 n.2).

⁷ 121 F.T.C. 190, 190 (1996); see *News and Comment*, Antitrust & Trade Reg. Rep. (BNA) 99 (1993). Chairman Steiger was joined by Commissioners Azcuenaga (the only independent), Owen, Starek, and Yao (the only Democrat). 4 Trade Reg. Rep. (CCH) ¶ 9562, at 16,451-52 (June 24, 1998) (Commissioner terms). The complaint was the result of an investigation that had started much earlier. See Brief of Petitioner California Dental Ass'n in the United States Court of Appeals for the Ninth Circuit at 5 n.3 (investigation began in 1985) [hereinafter CDA Ninth Circuit Brief].

⁸ Complaint ¶¶ 2, 9, California Dental Ass'n, 121 F.T.C. 190 (1996).

⁹ *Id.* ¶ 11.

¹⁰ 15 U.S.C. § 45(a) ("Unfair methods of competition, . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

¹¹ 121 F.T.C. at 195 (initial decision).

Judge Lewis Parker issued an eighty-page Initial Decision that found that CDA had violated Section 5. Judge Parker's opinion employed the Commission's unique *Mass. Board* structured antitrust analysis¹² to the exclusion of any other approach. Thus, the "Conclusions of Law" use *Mass. Board* terms and declare first that "the restrictions are inherently suspect" and then that "the restrictions are not justified."¹³ The opinion's affirmative case for finding a violation includes no discussion of the conventional rule of reason or, indeed, of any judicial antitrust opinion. Instead, there are two simple findings: suspectness and lack of justification.¹⁴

Judge Parker's finding of a Section 5 violation appends to suspectness and lack of justification an odd third subheading: "CDA's members do not have market power."¹⁵ Judge Parker briefly (one page) discusses

¹² Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988); see *infra* text at note 158.

¹³ 121 F.T.C. at 268, 270.

¹⁴ Judge Parker's Initial Decision is one of those old-fashioned opinions with endless numbered "findings of fact" followed by a much more abbreviated narrative comprising its "conclusions of law." This structure invited mischief. The 65 pages of "findings of fact" lent an air of thoroughness to the case, even though some factual issues that were later to be of interest to the Supreme Court had not been addressed. The 331 numbered "findings of fact" freely mix substantive declarations of market facts with simple recitation of trial episodes. Given the length of the decision, there are many examples of each. Factual conclusions address a variety of important issues. *E.g.*, Finding 282: "From 1982 until 1993, CDA and its components have challenged hundreds of advertising representations which on their face are not false or deceptive. . . . Many dentists, whose advertising was challenged, agreed to modify it. . . ." Even more "findings" simply recorded testimony, the way any reporter might. *E.g.*, Finding 179: "Dr. Miley . . . testified . . ."; Finding 180: "Dr. Kinney . . . testified . . ."; Finding 181: "Dr. Cowan . . . testified . . ."

Significantly, the listed "Findings of Fact" on "Economic Analysis" are almost exclusively reportorial. Particularly problematic, as subsequent developments would show, were two "Findings of Fact" that recited the testimony of defense economist Robert Knox:

322. Professor Knox testified that CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry (*i.e.*, an advantage which existing firms have over potential entrants) into any dental market in California (Tr. 1633).

....

326. Professor Knox concluded that even if CDA occasionally questions member advertisements which are not false or misleading in a material respect: "the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output" (Tr. 1640).

121 F.T.C. at 260; see also *id.* Finding 324 (Knox testified that scrutiny of dental advertising is procompetitive because false advertising harms competition).

¹⁵ 121 F.T.C. at 272. Judge Parker appears to have based this conclusion on his belief that any "problems experienced by dentists in opening a practice in California . . . do not pose an insurmountable obstacle to entry." *Id.* (citing James A. Langenfeld & John R.

CDA's lack of market power, declares that this lack of market power means that CDA's restraints would be lawful under the rule of reason, but then summarily indicates that neither lack of market power nor failure to satisfy the rule of reason should prevent Complaint Counsel from prevailing.¹⁶ In other words, Judge Parker first discussed market power and, after finding it absent, said that market power was irrelevant. Judge Parker concluded that "CDA's acts and practices unreasonably restrain competition"¹⁷

C. THE COMMISSION

On appeal from the Initial Decision, the Commission found a violation and entered an order.¹⁸ The heart of Chairman Pitofsky's quite strong opinion for the Commission—Part V—begins with a panegyric on the role of advertising in a competitive market system. Truthful advertising can inform consumers, lower prices, reduce entry barriers, and improve quality, wrote the Commission; and "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects."¹⁹

The Commission found and then condemned the price restraints as per se illegal and the price and non-price restraints under a rule of reason whose application, the Commission said, was "simple and short."²⁰ The Commission wrote that it was taking a "quick look under the

Morris, *Analyzing Agreements Among Corporations: What Does the Future Hold?*, 36 ANTITRUST BULL. 651, 677 (1991), which observed that entry prevents supracompetitive pricing).

¹⁶ 121 F.T.C. at 273: ("[T]he failure to establish the conditions for satisfaction of a Rule of Reason analysis is not fatal. See *Mass. Board*, 110 F.T.C. at 602 n.8: 'The Court [in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)] rejected the dentists' argument that the Commission erred in not making elaborate market power determinations"). To this language Judge Parker appended a cryptic footnote: "'Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason,' *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)."

¹⁷ 121 F.T.C. at 273.

¹⁸ Commissioner Starek filed a concurring opinion that disagreed only with the Commission's framework for analyzing the restraints. Commissioner Azcuenaga dissented from the finding of a substantive violation.

¹⁹ 121 F.T.C. at 296–97 (quoting *Mass. Board*, 110 F.T.C. at 605).

²⁰ 121 F.T.C. at 308 ("The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. As will be seen, here, application of the rule of reason is simple and short.") (citations omitted). Although the Commission used the per se and rule of reason categories rather than the *Mass. Board* series of questions, see *infra* text accompanying note 158, it wrote that the result it reached was "not inconsistent" with its *Mass. Board* decision. *Id.* at 321 & n.26.

rule of reason.’”²¹ The Commission found that CDA had “effectively precluded advertising that characterized a dentist’s fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.”²² Significantly, in light of the Supreme Court’s later analysis, the Commission also found that CDA’s program did not lead to the advertising of across-the-board discounts that included detailed itemization of particular fees.²³ The Commission did not make findings on whether or not CDA dentists advertised other discounts, likely because no one had made a serious argument that CDA dentists engaged in such advertising.

With respect to non-price advertising, the Commission concluded that “[i]n practice, CDA prohibits all quality claims.”²⁴ This was likely anticompetitive, according to the Commission, for the reasons given when it discussed the importance of advertising. The Commission concluded that “the restraints hamper dentists in their ability to attract patients . . . and thereby are likely to reduce output,” and they “deprive consumers of information they value and of healthy competition for their patronage.”²⁵ The Commission examined market power and found that CDA had sufficient power to impose its restrictions on its members and to withhold information successfully from consumers. As part of this analysis, the Commission considered CDA’s market share (75 percent of practicing dentists) and entry conditions (it found entry to be difficult).²⁶ Finally, the Commission reviewed possible efficiencies and found them lacking. It considered the analogy to *Bates v. State Bar of Arizona*,²⁷ where the Court had expressed concern that advertisements of professional services might be unusually misleading. The Commission’s response was that more recent Supreme Court opinions evince more “faith that the free

²¹ *Id.* at 316 (“As the third step in our quick look, we examine the efficiency justifications . . .”); *id.* at 320 (“As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects.”).

²² *Id.* at 301.

²³ *Id.* at 302.

²⁴ *Id.* at 308.

²⁵ *Id.* at 311.

²⁶ The Commission correctly observed that it has never been held, as Judge Parker appears to have believed, that only “insurmountable” entry barriers are cognizable in antitrust analysis. *Id.* at 315.

²⁷ 433 U.S. 350, 383–84 (1977) (“[B]ecause the public lacks sophistication concerning legal services, misstatements that might be over-looked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.”).

flow of commercial information is valuable;"²⁸ that quality claims should not be broadly prohibited without some effort to determine their accuracy; and that "CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts."²⁹

The Commission majority was strongly attacked by Commissioner Azcuenaga, who issued a thirty-page dissent.³⁰ In part she took up CDA's theme, and argued that all was lawful because market power had not been shown. In part she condemned the leaving behind of *Mass. Board* and what she said was unjustified application of the per se rule. Most of her remarkably long, detailed dissent consists of a fine-toothed review of the evidence and a disagreement with the majority's fact finding.³¹

D. THE NINTH CIRCUIT

In the Ninth Circuit, CDA successfully assaulted the Commission's invocation of the per se rule, but otherwise it persuaded only Judge Real. Judge Real, who wrote a dissenting opinion, favored CDA's position on jurisdiction and on the merits. On the merits, he said that "a full market power analysis" should have been conducted because CDA did not engage in "any naked restraints."³² He concluded that CDA was merely seeking to prevent "misleading or unreliable advertising," and it "does not in any way infringe upon the rights of any member to advertise providing the advertising is not 'false or misleading in any material respect.'" ³³

²⁸ 121 F.T.C. at 318 (quoting *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 646 (1985))).

²⁹ 121 F.T.C. at 319-20 (citation to Initial Decision omitted).

³⁰ For a contemporaneous criticism of the Commission's CDA opinion, see Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613 (1996).

³¹ Commissioner Azcuenaga asserted that Complaint Counsel had failed factually to prove its case, in part because they and Judge Parker had assumed that actions of local chapters were attributable to CDA, whereas the Commission had not found this, and, accordingly, had conducted an independent review of the record. 121 F.T.C. at 337. She asserted that "there is no empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states." *Id.* at 338; see also *id.* at 339 ("the record suggests that CDA has not deterred dentists in California from advertising"). Commissioner Azcuenaga questioned "whether the record provides a sufficient basis to find that CDA prohibits price advertising," *id.*, and said that more fact finding and reflection was needed before CDA's non-price advertising restraints were condemned.

³² 128 F.3d at 731.

³³ *Id.* (quoting CDA's Code of Ethics).

The majority, in an opinion by Judge Hall, disagreed. It tried to separate issues of law, which are reviewed *de novo* but with some deference, from “findings of fact and economic conclusions,” which are evaluated “under the substantial evidence standard.”³⁴ It saw application of an abbreviated rule of reason as an issue of law. The Commission appropriately used this method of analyzing CDA’s restrictions on price advertising, the court reasoned, because CDA’s justification—“preventing false and misleading price advertising”—did not “require[] more than a quick look under the rule of reason” because in practice CDA prohibited all across-the-board discounts.³⁵ “Indeed, the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental prices.”³⁶ For nonprice advertising, a “quick look rule of reason analysis” also was appropriate, among other reasons because any concern that such advertising may be misleading “does not justify banning all quality claims, without regard to whether they are, in fact, false or misleading.”³⁷

Having found that abbreviated analysis was appropriate, the court then found that substantial evidence supported the Commission’s findings that CDA “prohibit[ed] ads that were in fact true and nondeceptive” and that “CDA restricted nonprice advertising without any particular consideration of whether it was true or false.”³⁸ “Given the facially anti-competitive nature of both the price and nonprice advertising restrictions, the evidence of the CDA’s large market share and influence justifies finding a violation under the quick look rule of reason.”³⁹ The court affirmed the Commission’s decision and enforced its order.

E. THE SUPREME COURT

The 2-1 division in the Ninth Circuit, in part on an issue (jurisdiction) on which the Supreme Court had split when it was presented in 1982,⁴⁰

³⁴ *Id.* at 725.

³⁵ *Id.* at 728.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 729.

³⁹ *Id.* at 730. The Ninth Circuit also relied upon Professor Hovenkamp’s commentary on the Commission’s CDA opinion to reason that restricting information was itself “a form of output limitation.” *Id.* at 728 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 693–94 (Supp. 1997)). Professor Hovenkamp had even wondered “whether the horizontal restrictions on non-price advertising really merited rule of reason treatment at all.” AREEDA & HOVENKAMP, *supra*, at 693.

⁴⁰ See American Med. Ass’n, 94 F.T.C. 701, 983 (1979), *aff’d by an equally divided Court*, 455 U.S. 676 (1982).

set up CDA's successful petition for certiorari.⁴¹ The Supreme Court unanimously agreed with the finding of jurisdiction. By a vote of 5-4, however, it ruled that the Ninth Circuit had applied too quick a look, and it vacated the judgment and remanded the case.

Justice Souter's opinion for the Court is an enigma. The Court held that the Ninth Circuit "erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable)."⁴² The Court viewed this as a threshold legal decision, and thus it did not "reach the question of the substantiality of the evidence supporting the Commission's conclusion."⁴³ In the end, however, the Court did not rule that CDA's restraints were lawful or even that they should be judged under the full-blown rule of reason. Rather, the Court simply said that the justifications that CDA presented were sufficiently substantive that "[f]or now, at least, a less quick look was required for the initial assessment of the [alleged anticompetitive] tendency of these professional advertising restrictions."⁴⁴ The Court vacated the judgment and remanded "for a fuller consideration of the issue."⁴⁵

Beyond the resolution of this particular dispute, *CDA* may enjoy a lengthy career as the Supreme Court's latest word on fundamentally

⁴¹ CDA's "Questions Presented" were as follows:

The Federal Trade Commission . . . alleg[ed] that the California Dental Association ("CDA"), a non-profit professional association, violated Section 5 . . . by prohibiting member dentists . . . from engaging in false or misleading advertising. Despite the finding by the Administrative Law Judge that CDA's enforcement of its Code of Ethics "has no negative impact on competition," the Commission and the Court of Appeals held that CDA violated the antitrust laws. The two basic questions presented by this petition are:

1. Whether the Commission has jurisdiction over nonprofit professional associations.

2. Whether a nonprofit professional association violates the antitrust laws under the rule of reason when its advertising disclosure requirements are animated by procompetitive purposes, do not directly affect price or output, and have no negative impact on competition.

Petition for Writ of Certiorari at i, *California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999) (No. 97-1625).

⁴² 119 S. Ct. at 1612.

⁴³ *Id.*

⁴⁴ *Id.* at 1618.

⁴⁵ *Id.* It left for the court of appeals whether or not to remand the case to the Commission "for a more extensive rule-of-reason analysis on the basis of an enhanced record." *Id.* at 1612 n.8. More than two months after the Court's decision, the FTC moved for remand. Motion of Respondent Federal Trade Commission for Remand, *California Dental Ass'n v. FTC*, No. 96-70409 (9th Cir. filed July 29, 1999). After receiving CDA's response opposing remand, and an FTC reply, the Ninth Circuit denied the FTC's request.

important questions about antitrust laws' rule of reason.⁴⁶ New and not altogether mellifluous words have been added to the antitrust vocabulary ("an enquiry meet for the case;" how confident can one be "from a quick (or at least quicker) look, in place of a more sedulous one").⁴⁷ Commentators have and will read a variety of messages into the Court's Delphic phrases.

Justice Breyer, writing for four Justices, wrote such a powerful and persuasive dissenting opinion that one has to wonder why Justice Souter, who is often regarded as a swing vote, did not join it. Indeed, Justice Souter for the Court came close to saying that had the Ninth Circuit authored Justice Breyer's opinion, the Court would have affirmed.⁴⁸ Justice Breyer's stature as an antitrust expert makes it likely that his opinion will be consulted with unusual frequency.⁴⁹

II. JURISDICTION

The jurisdictional issue turned out even worse for CDA and its amici on this issue than they could have imagined. The FTC was affirmed on a more aggressive theory than the agency had previously adopted, and the spotlight of Supreme Court attention was turned onto the potential competitive abuses one can expect from associations.

Up until oral argument, the jurisdictional question had played quite well for CDA. The issue was how to interpret language in the FTC Act that conferred that agency with jurisdiction over "persons, partnerships, or corporations,"⁵⁰ and that, oddly enough, defined "corporation" broadly to include "any company . . . or association, incorporated or unincorporated, . . . which is organized to carry on business for its own profit or that of its members."⁵¹ After the FTC found jurisdiction, invoking its usual test that looks to whether the association "confers pecuniary

⁴⁶ The Court's most recent analysis of per se/rule of reason issues was in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (horizontal division of markets between potential competitors is per se illegal).

⁴⁷ 119 S. Ct. at 1618.

⁴⁸ *Id.* at 1617 ("Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly Justice Breyer's treatment of the antitrust issues here is no 'quick look.'").

⁴⁹ For an antitrust decision for which a non-majority opinion (a concurrence in the judgment) is regularly cited, see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 32 (1984) (O'Connor, J., concurring in the judgment) (with Burger, Ch. J., and Powell & Rehnquist, J.J.).

⁵⁰ 15 U.S.C. § 45(a)(2).

⁵¹ 15 U.S.C. § 44.

benefits upon its members as a substantial part of its activities,"⁵² the Ninth Circuit affirmed but recognized a Circuit split. This set up CDA to file a petition for certiorari that led with this issue. Several amici joined CDA in urging the Court to address the issue and divest the FTC of jurisdiction over nonprofit professional associations.

The situation turned bleak for CDA and its allies at oral argument. CDA's counsel was pelted with questions from Justices questioning CDA's recommended test (whether the association earns more revenue than its expenses and pays out shares of that net "profit"). When counsel pointed to its favorite case, *Community Blood Bank of the Kansas City Area, Inc. v. FTC*,⁵³ Justice Breyer dismissed that as a lower court opinion, and said that he "would have thought it [the statutory distinction] was designed to distinguish trade associations from charities."⁵⁴ When counsel insisted that it was essential that the association earn a profit, a Justice pointedly asked, "Were organizations like the Cement Institute,⁵⁵ the Sugar Institute,⁵⁶ the Maple Flooring Association⁵⁷—were they themselves making a profit? I doubt it."⁵⁸ When counsel noted that it was not seeking an exemption from the antitrust laws, just a denial of FTC jurisdiction, Justice Stevens noted that advertising, such as was at issue here, was typically an FTC responsibility. Another Justice astringently noted that some trade associations, "as some in our sorry history of antitrust laws have in the past done, are engaged in price fixing."⁵⁹ Finally, a Justice asked for the difference between CDA and the associations previously mentioned, if one were to assume that they did not book a profit. Counsel responded, "We have a public purpose. We promote the art and science of dentistry." The Justice rejoined, "Well, I believe Maple Flooring would have promoted the art and science of maple flooring. It's beautiful, you know, aesthetically attractive, and so forth."⁶⁰ Counsel moved on to the merits.

The final result was worse for CDA and other professional associations than if CDA had never sought certiorari. Before CDA sought certiorari,

⁵² 121 F.T.C. at 290.

⁵³ 405 F.2d 1011 (8th Cir. 1969).

⁵⁴ Transcript of Argument Before the Supreme Court at 8, *California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999) (No. 97-1625) [hereinafter *Supreme Court Transcript*]. All references to particular Justices are based on eyewitness accounts, because the Court transcript does not identify the Justice asking a question.

⁵⁵ *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925).

⁵⁶ *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936).

⁵⁷ *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

⁵⁸ *Supreme Court Transcript*, *supra* note 54, at 10.

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 17.

associations could say that the circuits were split and the Court was divided. Now, a unanimous Supreme Court has spoken. As part of its discussion, it highlighted the anticompetitive potential of nonprofit associations:

Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair or deceptive acts. It may even be possible that a nonprofit entity up to no good would have certain advantages . . . over a for-profit membership organization . . . ; it would enjoy the screen of superficial disinterest⁶¹

Comments during oral argument, as noted above, also suggest considerable skepticism about the likelihood that associations can be trusted to protect the public interest.

The truly surprising wrinkle is the Court's adoption of a more expansive jurisdictional test than even the Commission had employed. The Commission applied its customary substantiality test to the activities of CDA: "[T]he Commission can 'assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity.'"⁶² The Ninth Circuit accurately enunciated this test and approved the Commission's use of it.⁶³ The Solicitor General (SG) also accurately described the Commission's "substantial part of the total activities" test and defended the agency's use of it, going so far as to ask for *Chevron* deference.⁶⁴ However, the SG also wrote descriptively about the FTC's

⁶¹ 119 S. Ct. at 1611–12.

⁶² 121 F.T.C. at 289 (quoting *American Medical Ass'n*, 94 F.T.C. 701, 983 (1979), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (alterations after the first one in the original)); *see also* 121 F.T.C. at 290 ("we . . . review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities").

⁶³ 128 F.3d at 725–26 ("The FTC has consistently held that it has jurisdiction over a nonprofit entity if a substantial part of the entity's total activities provides pecuniary benefits to its members. . . . The FTC's approach of looking at whether the organization provides tangible, pecuniary benefits to its members as a surrogate for 'profit' is a proper way of deciding which nonprofit organizations are subject to its jurisdiction.").

⁶⁴ Brief for the Respondent at Heading I, *California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999) (No. 97-1625) [hereinafter SG Brief]; *id.* at 8; *see also* Supreme Court Transcript, *supra* note 54, at 32 (Mr. Wallace) ("As long as the pecuniary benefit that they're engendering for their members is a substantial part of the organization's total activities rather than incidental to some noncommercial activity . . ."). The SG argued that because "the word 'profit' is capable of the construction that the FTC has placed on it . . . that construction is entitled to deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984) (citing *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring)). SG Brief at 11. CDA responded that *Chevron* was inapplicable because Congressional intent was clear, and it protested

exercise of jurisdiction with words that the Court decided to seize: "From its earliest days, the FTC has exercised its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses . . ." ⁶⁵ This apparently triggered a colloquy at oral argument where Justice Ginsburg suggested that the focus would better be on "substantial benefits" than on "substantial activities." ⁶⁶ The suggestion must have appealed to entire Court.

In its opinion, the Court formally adopted a jurisdictional test that turns on whether nonprofit associations provide their for-profit members with substantial economic benefits. The Court said that the Commission "now advances . . . [this] slightly different formulation," quoting from the SG's brief, and concluded that because "the interpretation urged" in the brief is "clearly the better reading of the statute," the Court did not need to consider the SG's request for "deference to this interpretation of the Commission's jurisdiction." ⁶⁷ In fact, as noted above, the SG had never requested deference for this interpretation because he was defending the Commission's slightly different interpretation.

While thus claiming to adhere to a standard advanced by the Commission, the Court rejected the Commission's practice of examining a nonprofit association's activities. ⁶⁸ Instead, the Court held that "an entity organized to carry on activities that will confer greater than *de minimis*

that the Commission had not sought *Chevron* deference before the Ninth Circuit—even admitting at oral argument that deference isn't owed on this sort of jurisdictional question—and thus the Court could "ignore" the argument. Reply Brief of Petitioner, *CDA*, at 8–9 & n.8 [hereinafter *CDA* Supreme Court Reply Brief]. The FTC of course participated in writing the SG's brief, which bears the names of the FTC General Counsel and Assistant General Counsel and two FTC attorneys, but for simplicity this article will refer simply to the "SG's" brief.

For a good review of this *Chevron* dispute that argues vigorously against deference to "peripheral jurisdictional issues," see Ernest Gellhorn & Paul Verkuil, *Delegation: What Should We Do About It? Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999).

⁶⁵ SG Brief, *supra* note 64, at 9; *cf. id.* Heading I.A.

⁶⁶ Supreme Court Transcript, *supra* note 54, at 35–36:

QUESTION: Mr. Wallace, may I seek this clarification? You are trying to get some kind of a handle on pecuniary benefits by using the word substantiality. [Yes] But you've used that to modify activities. Perhaps what it should modify is the business benefits [M]aybe the substantiality belongs with what is the benefit to the business of the dentists rather than the activity. Or doesn't it matter?

MR. WALLACE: Well, I did not choose the formulation that I used. I was quoting the commission's formulation and—

QUESTION: A problem counsel is often faced with, yes.

(Laughter.)

⁶⁷ 119 S. Ct. at 1610.

⁶⁸ *Id.* at 1611 ("There is . . . no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer

or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction."⁶⁹ As the Court somewhat cryptically wrote, "To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach" ⁷⁰

With all due respect, it is not good judicial craftsmanship to claim to adopt an agency's view while adopting a different standard, even if that standard is taken from an agency brief. FTC Commissioners most formally set forth their views in opinions, which are adopted by vote after lengthy deliberation and circulation of drafts. Commissioner names go on opinions, not briefs.⁷¹ Deference is owed to agency opinions, not to briefs even of the consistently high level of excellence attained by the Solicitor General.⁷²

Nor is the Commission likely to test the outer boundaries of jurisdiction under the Court's formulation. For instance, Deputy Solicitor General Wallace was asked about fraternal organizations, such as the Knights of Columbus and the Elks, which might facilitate their members receiving discount homeowners insurance. One Justice observed, "I really find it hard to see what . . . the exemption was put in for if the Knights of

formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit.").

⁶⁹ *Id.* at 1611 n.6. The Court reserved on whether the FTC has jurisdiction over some nonprofit organizations that do not confer economic benefits on for-profit members, and on "whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate the Commission's jurisdiction." *Id.*

⁷⁰ *Id.* at 1611.

⁷¹ The Solicitor General's *CDA* brief bears the names of the Solicitor General and two lawyers in his office, the Assistant Attorney General, the FTC's General Counsel and two lawyers in her office, and an attorney from the FTC's Bureau of Competition. The Commission opinion in *CDA* was authored by Chairman Pitofsky and joined by two other Commissioners. Commissioners Azcuenaga and Starek filed separate opinions that concurred in the Commission majority's finding of jurisdiction.

⁷² *See, e.g.,* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972) ("[W]e must look to its [the FTC's] opinion, not to the arguments of its counsel, for the underpinning of its order. 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" (quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971))); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (review of the validity of SEC order is confined to the grounds upon which the Commission based its action).

Ironically, *CDA* had protested that an SG argument concerning jurisdiction (that the Commission was entitled to *Chevron* deference) had not been made below and thus the Court was "entitled to ignore" it. *CDA Supreme Court Reply Brief*, *supra* note 64, at 9 (citing *Schiro v. Farley*, 510 U.S. 222, 228–29 (1994)).

Columbus and the Elk are covered.”⁷³ General Wallace responded that the Commission had always agreed “that purely charitable organizations are not covered, and that might include other eleemosynary organizations.”⁷⁴ Even though one could argue that membership in organizations can facilitate business networking and develop social skills of economic benefit, it seems unlikely that the Commission will seize on the Court’s new formulation to attack entities that would not have satisfied the Commission’s traditional standard. Nor, since the actual *CDA* holding (i.e., the facts conjoined with the result) is consistent with the FTC’s traditional test, is it clear that a court would go beyond that holding to confer jurisdiction over a genuine charity, regardless whether it confers economic benefits. By adopting language unexplored by the Commission and the lower courts and not actually advocated by the Commission itself, however, the Supreme Court has created uncertainty about just how far the Commission’s jurisdiction extends.

III. PROFESSIONAL ADVERTISING

The Supreme Court majority evinced extraordinary antipathy toward professional advertising. The Court ruled that a complete ban on all advertisements of quality or across-the-board discounts could be lawful. This proposition is sufficiently audacious that *CDA* did not rely on it before the Commission or the Ninth Circuit. Indeed, in the proceeding on remand in the Ninth Circuit, *CDA* has called for briefing on issues relating to professional advertising because “[t]he parties did not address these issues in their briefs to this Court on the initial appeal”⁷⁵

The Supreme Court began by summarizing what it saw as problems associated with professional advertising. Citing secondary sources not suggested by the parties or amici, it wrote about information disparities, the difficulty of comparing service packages and getting and verifying information, the challenge of measuring quality, and the possibly irrational ties between patients and particular professionals.⁷⁶ The Court major-

⁷³ Supreme Court Transcript, *supra* note 54, at 34.

⁷⁴ *Id.*

⁷⁵ Motion of California Dental Association for a Briefing Schedule and for Oral Argument, No. 96-70409 (9th Cir. filed Oct. 22, 1999).

⁷⁶ 119 S. Ct. at 1613–14 (citing Jack Carr & Frank Mathewson, *The Economics of Law Firms: A Study in the Legal Organization of the Firm*, 33 J.L. & ECON. 307, 309 (1990); George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Hayne Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1330 (1979)); 1 BARRY R. FURROW ET AL., *HEALTH LAW* § 3-1, at 86 (1995); Robert G. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, in *OCCUPATIONAL LICENSURE AND REGULATION* 235–36 (Simon Rottenberg ed., 1980). The Court did not discuss the

ity is obviously uncomfortable with advertising by professionals.⁷⁷ (Indeed, it observed, with perhaps more wishful thinking than empiricism, that for "professional services . . . advertising is relatively rare."⁷⁸)

The Supreme Court majority subscribed to the notion that there is something nefarious about "unverifiable" ads. Thus, it wrote that the threshold issue in the case "is whether professional price and quality advertising is sufficiently verifiable in theory and in fact" that a ban of "truthful and verifiable price and quality advertising" should require justification.⁷⁹ The Court simply asserted that only advertisements that "are both verifiable and true" deserve to "escape censure."⁸⁰

literature showing that prices of professional services tend to be lower where advertising is more freely permitted, *see, e.g.*, RONALD BOND ET AL., EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980); Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421 (1975).

⁷⁷ The Court quoted almost all of footnote 17 from the landmark decision applying antitrust to legal services, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1985):

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. the public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

(quoted at 119 S. Ct. at 1613 n.10). It is revealing that the 5-4 splits in *CDA* and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), which upheld Florida's 30-day bar on lawyer solicitation of accident victims, were identical except that Justices Breyer and Souter traded places. The Chief Justice and Justices O'Connor, Scalia, and Thomas were in both majorities; Justices Stevens, Kennedy, and Ginsburg dissented in both. The Chief Justice and Justices O'Connor, Scalia, and Souter (with Justice White; Justice Thomas had not yet replaced Justice Marshall) were also together in the Chief Justice's opinion for the Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which emphasized the legitimacy of much state regulation of lawyer speech.

Florida Bar turned on the protection of lawyer communications as commercial speech, but issues obviously overlap. *See generally* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 858-59 (1999) (review of commercial speech doctrine and its underpinnings, with a sympathetic review of *Florida Bar*); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (unabashed defense of commercial speech); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985) (advertising is important to lawyer competition); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) (worrying about the too-casual protection of commercial speech); Marc David Lawlor, Note, *Ivory Tower Paternalism and Lawyer Advertising: The Case of Florida Bar v. Went For It, Inc.*, 40 ST. LOUIS U. L.J. 895 (1996) (criticizing the case).

⁷⁸ 119 S. Ct. at 1613.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1616.

With respect to discount advertising, the stone on which the Commission stumbled was the Supreme Court's belief that CDA's regulations might simultaneously eliminate all across-the-board advertising and encourage detailed advertising of specific prices for particular services, with the *net* effect being to increase the amount of pricing information that consumers receive. "CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information . . . created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)."⁸¹ The court of appeals had observed that CDA appeared to prohibit all across-the-board discounts and that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing."⁸² The Court chastised the Ninth Circuit for what the Supreme Court regarded as relying merely on the absence of information.

For quality claims, the Ninth Circuit had ruled that even though they are difficult to verify, "this concern 'does not justify banning all quality claims without regard to whether they are, in fact, false or misleading.'"⁸³ The Supreme Court commented that the Ninth Circuit had wrongly assumed that some quality claims deserve to be permitted "because they are both verifiable and true."⁸⁴ This was error, according to the Court, because it was "at least equally plausible" that banning all quality claims "would have a procompetitive effect by preventing misleading or false claims that distort the market."⁸⁵

A. PROFESSIONAL ADVERTISING: THE LITIGATION

Although not entirely its own fault,⁸⁶ the Supreme Court was unfair to the Ninth Circuit. That court's emphasis on whether CDA interfered with truthful advertising responded directly to the justification for its actions on which CDA relied before the Commission and the Ninth Circuit. The justifications the Supreme Court found plausible were not ones on which issue had been joined below.

⁸¹ *Id.* at 1615; *see also id.* at 1614-15 ("Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not *a priori* analysis.").

⁸² 128 F.3d at 728.

⁸³ 119 S. Ct. at 1616 (quoting 128 F.3d at 728).

⁸⁴ 119 S. Ct. at 1616.

⁸⁵ *Id.* (citations omitted).

⁸⁶ The Solicitor General might have been more pointed in his comments on this subject. *See infra* note 292.

Before the Commission, CDA argued that its activities must be procompetitive or, at worst, harmless, because it lacked market power,⁸⁷ and it insisted that the ALJ was simply wrong in concluding that it banned any truthful advertising.⁸⁸ CDA asserted that it and its components challenged only advertisements that they believed, “in good faith . . . are false or misleading in a material respect to consumers of ordinary prudence.”⁸⁹ “Competition for consumers of dental services in California is flourishing and intensifying,” CDA insisted.⁹⁰ Pointing to “Yellow Pages” advertisements that had been entered into the record largely by Complaint Counsel,⁹¹ CDA claimed that the number of advertisements had increased and that consumers “have ready access to dental advertisements” that “offer ‘senior discounts’ and other ‘across-the-board discounts’ ” that boast of “ ‘low’ or ‘affordable’ ” fees, and that make “ ‘comfort,’ ” “ ‘state of the art or modern,’ ” “ ‘superiority,’ ” and other “so-called ‘quality claims.’ ”⁹² Thus, when the Commission addressed CDA’s justifications

⁸⁷ Brief of Appellant CDA, California Dental Ass’n, FTC Dkt. No. 9259, at 27–28 [hereinafter CDA Commission Brief]; see *infra* Part IV.C.1(a).

⁸⁸ CDA Commission Brief, *supra* note 87, at Heading V.B “The Evidence Does Not Support The ALJ’s Finding That CDA ‘Bans’ Truthful Advertising.”

⁸⁹ *Id.* at 46. CDA claimed that dental services are an “experience good” for which there is an information “asymmetry,” and it cited *Bates* for the proposition that “unverifiable quality or performance claims, ‘under some circumstances, might well be deceptive or misleading to the public, even false,’ ” but this discussion was merely supportive of CDA’s assertion that it challenged only ads which were believed to be false or misleading. *Id.* at 44–46.

⁹⁰ Reply Brief of Appellant CDA, California Dental Ass’n, FTC Dkt. No. 9259, at 20 [hereinafter CDA Commission Reply Brief].

⁹¹ During oral argument before the Commission, Complaint Counsel was asked about dentists’ Yellow Pages advertising, and responded as follows:

An important thing to note is that most of these exhibits and excerpts from dental advertising were put in the record by complaint counsel, and the reason being is that they actually do show a high level of adherence . . .

Let me give you one example . . . There are over 1100 individual listings in the San Francisco Yellow Pages for dentists, but there are only six advertising senior citizen discounts. As best we can tell, only three of them are CDA members.

[W]e are not really sure how many of these cases CDA has actually gone after . . . But based on the evidence in the record, it suggests they have probably gone after the vast majority of even those.

Transcript of Oral Argument, California Dental Ass’n, FTC Dkt. No. 9259, at 34–35 [hereinafter Commission Transcript].

⁹² CDA Commission Reply Brief, *supra* note 90, at 21–22:

These exhibits demonstrate that consumers incontrovertibly have ready access to dental advertisements that:

- make so-called “comfort and caring claims” designed to appeal or assuage consumer fears and or previous negative dental experiences;
- make so-called “superiority claims” designed to set the advertising dentist apart from his or her competitors or to separate the advertising dentist from consumer perceptions concerning dentists;

of its nonprice advertising restraints, it addressed CDA's claim that "CDA challenges only advertising that is false and misleading."⁹³

At oral argument before the Commission, CDA's counsel set out to make "three contentions," none of which related to justifications: (1) since CDA "did not have market power as expressly found by the Administrative Law Judge, there is no violation of Section 5;" (2) "there was not a unity of purpose or a common design in [sic] understanding or a meeting of the minds;" and (3) "CDA is a bona fide 'not for profit,' and as such is not subject to FTC jurisdiction."⁹⁴ During the argument, CDA insisted that "there is no ban" on quality claims, and dentists are free to advertise "quality care dentistry."⁹⁵ Despite continuous pressing for any justification for restricting truthful discount claims, not once did counsel suggest a net pro-disclosure effect; instead, the assertion was that CDA had not caused even a gross lessening of disclosure, and that the ALJ found no anticompetitive effect.⁹⁶ Indeed, counsel seemed to agree that

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- make so-called "quality claims" designed to set the advertising dentist apart from his or her competitors or to separate the advertising dentist from consumer perceptions concerning dentists;
 - claim that the fees of the advertising dentist are "low" or "affordable" or use terms or phrases of similar import;
 - offer "senior discounts" and other similar "across-the-board discounts" without specifying all fee variables; and
 - use "state of the art" or "modern" or terms and phrases of similar import.

⁹³ 121 F.T.C. at 316. CDA's argument that its activities were "procompetitive" was based principally on the assertion that Judge Parker had found (*see supra* note 14) (1) no negative effect on competition and (2) "that scrutiny of dental advertising is procompetitive because advertising which is false or misleading has a negative impact on competition." CDA Commission Brief, *supra* note 87, at 27 (quoting ALJ Finding 324) (emphasis omitted). As part of a discussion asserting that CDA does not "ban[] truthful advertising," *id.* at 34, CDA asserted that it "encourages full disclosure of price information." *Id.* at 36 (emphasis omitted). Other than citing one witness who said the disclosure requirements are not burdensome, *id.* at 37, there is no assertion, let alone citation of evidence, that dentists actually engage in any of the kind of detailed discount advertising theoretically permitted by CDA. For discount and nondiscount advertising, CDA claimed that it prevented only advertising reasonably believed to be "false or misleading in a material respect." *Id.* at 46. This part of CDA's argument was relatively perfunctory; the heart of the argument concerned market power.

⁹⁴ Commission Transcript, *supra* note 91, at 4–5.

⁹⁵ *Id.* at 67. *But cf. id.* at 64 (CDA argued because there is "asymmetric information," comparative advertising may lead them to an inferior dentist who will discourage them from ever again seeking dental care).

⁹⁶ When Chairman Pitofsky sought to examine competitive effects, he discussed a hypothetical advertisement of a 10% senior citizen discount. CDA's counsel responded that such an advertisement would "[n]ot necessarily" violate CDA's ethics code. (CDA's counsel claimed that the decision would be made by CDA's component societies, for which CDA should not be held responsible. *Id.* at 18. "Some of the component societies take that [a state regulation] to mean that unless you have all of the prices in the advertisement, you violated the false and misleading standard. Other components take the position that it is impractical to do that and, therefore, they do not find violation." *Id.* at 12–13.)

the restraints would negatively affect prices as a matter of theory; his only objection was to what he claimed was a failure of proof.

In the Ninth Circuit, CDA advanced similar arguments, although with a slightly different twist. In a brief principally devoted to other issues (e.g., market power), CDA argued that it had the "lawful" "purpose" of restricting only "false or misleading" advertisements, and "any problems resulting from implementation of that policy" were the responsibility of components for which "CDA should not be held legally responsible."⁹⁷ In its reply brief, it argued that the Commission had failed to show that CDA "banned truthful advertising" because the Commission "never established that the advertising allegedly prohibited by CDA was 'truthful.'"⁹⁸ A subsequent iteration of this argument alluded to a slightly different thought, by complaining that there was no record evidence that prohibited claims were "truthful or substantiated."⁹⁹ Neither CDA brief either admitted (even for the sake of an argument) or sought to justify a ban on quality claims.¹⁰⁰ The Ninth Circuit's opinion emphasized the strength of the record supporting the Commission's finding that CDA banned ads without regard to their truthfulness because this was the finding that CDA attacked so strongly.

In its briefs on the merits to the Supreme Court, CDA justified its restrictions quite differently than it had at the Commission and with the

When Pitofsky asked for the justification for banning a truthful claim of a 10% discount, CDA's counsel responded that "there may not be anything wrong with" such an ad. *Id.* at 65. Chairman Pitofsky pressed counsel on whether a ban on such advertising would be "questionable" under the antitrust laws. Counsel responded that there is no antitrust problem because "what the advertising ban is, it is false and misleading, so it is a question of interpretation." *Id.* at 66.

⁹⁷ CDA Commission Brief, *supra* note 87, at 63 (quoting initial decision). Perhaps inspired by Commissioner Azcuenaga's dissent, CDA made more of an argument that its requirements procompetitively "increase[d] the amount of information provided to consumers," *id.* at 32-33, but this assertion was made without much elaboration. CDA's principal argument was that limitations were imposed by state law, not CDA, and CDA's requirements were not burdensome.

⁹⁸ CDA Commission Reply Brief, *supra* note 90, at 12.

⁹⁹ *Id.* at 26 ("Under the circumstances, the FTC's assertion that CDA proscribes truthful and/or nondeceptive advertising is not supported by substantial evidence.").

¹⁰⁰ Even in its reply brief, CDA's position was founded upon a claimed failure of factual proof: "Although the Commission and FTC staff speculate that the disclosure effectively bar across-the-board discounts (Br. at 43), neither point to a *single instance* in which a dentist desired to advertise a discount but could not because of the burden of making the disclosures." *Id.* at 25 (emphasis in original; footnote omitted). The Ninth Circuit wrote that CDA "contends that claims about quality are inherently unverifiable and therefore misleading," and explained that this would not justify banning all quality claims without regard to whether they are false or misleading. 128 F.3d at 728. Although inartfully phrased, the Ninth Circuit probably did not mean that CDA was seeking to justify a complete ban on quality claims, since CDA's briefs and its litigation before the Commission made no such claim.

Ninth Circuit. Whereas CDA insisted to the Commission that "consumers incontrovertibly have ready access" to advertisements that boast of "'low' or 'affordable'" fees or "use terms or phrases of similar import,"¹⁰¹ CDA wrote to the Supreme Court that "[a]dvertisements consisting of unverifiable pricing claims, such as 'lowest prices' or 'bargains,' have been challenged as being not susceptible of measurement and therefore likely to be false or misleading."¹⁰² The subtle focus on the net effect of its rule, with enhanced disclosures offsetting information lost through the ban on claims of broad discounts, first appeared in CDA's merits brief in the Supreme Court.¹⁰³ In the Supreme Court, CDA placed increased emphasis on its argument that its "advertising guidelines are procompetitive on their face."¹⁰⁴ Using a new example and relying on a secondary source not previously cited, CDA asserted that dentists easily could advertise 10 percent off a specific procedure, such as filling a cavity, which would be meaningful because "only a handful of dental procedures comprise a large percentage of a dentist's practice."¹⁰⁵ Although CDA pointed to no evidence that dentists actually place such advertisements, it claimed that the Ninth Circuit should have examined "the net competitive effect of a disclosure requirement."¹⁰⁶ CDA thus issued a call for a carefully quantified balancing.

CDA's justifications of its restrictions on quality claims also benefited from a new spin in the Supreme Court. CDA recast these restrictions as "substantiation policies,"¹⁰⁷ and reintroduced the concept of "verifiability." Quoting at length from an article it did not cite below,¹⁰⁸ it asserted that advertising claims "that are unverifiable—such as claims that a dentist provides 'progressive' dentistry or the 'finest dental care'—are potentially misleading."¹⁰⁹ Whereas before the Commission CDA had boasted that consumers are inundated with "so-called 'quality claims'" using

¹⁰¹ See *supra* note 92.

¹⁰² CDA Commission Brief, *supra* note 87, at 5.

¹⁰³ CDA's petition for certiorari justified its restrictions with a more general claim that it was "preventing false and misleading advertising." See Petition for Writ of Certiorari at i (Questions Presented), 21.

¹⁰⁴ Brief of Petitioner, CDA, No. 97-1625, at 33 (Subheading II.A.2) [hereinafter CDA Supreme Court Brief].

¹⁰⁵ *Id.* at 36 n.11 (citing AMERICAN DENTAL ASSOCIATION, THE 1990 SURVEY OF DENTAL SERVICES RENDERED 25-29 (1994)).

¹⁰⁶ *Id.* at 37.

¹⁰⁷ *Id.* at Heading II.B.2.c ("CDA's substantiation policies prevent misleading professional advertising and increase consumer information."). LEXIS and Westlaw checks of Supreme Court filings reveal no other document that used the term "substantiation."

¹⁰⁸ Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 801, 803 (1979) (quoted at CDA Supreme Court Brief, *supra* note 104, at 38-39).

¹⁰⁹ CDA Supreme Court Brief, *supra* note 104, at 38.

general terms, such as "modern" and "comfort" and "superiority,"¹¹⁰ CDA argued to the Supreme Court that its policies "prohibit[] . . . subjective, unverifiable claims" such as "'progressive' dentistry or 'finest dental care,' " because such claims "convey no useful information and carry a significant potential for deception."¹¹¹ Only to the Supreme Court did CDA argue that dentists were permitted to advertise only "the facts that underlie subjective claims."¹¹²

B. PROFESSIONAL ADVERTISING: THE SUPREME COURT

CDA's arguments, as crystalized for the first time at the Supreme Court, found a receptive audience. The Court rattled off a series of ways in which advertising of across-the-board discounts could be sub-optimal: by containing misstatements, by being misleading, and by being less effective than advertisements communicating more detailed pricing information.¹¹³ (The concern about misstatements and deception seems misplaced, since the Court suggested neither that CDA limited its prohibition to deceptive ads nor that deceptive ads could be prevented only by a prohibition of all across-the-board discounts.)

The extent of the Court's hostility to professional advertising is illustrated by the casualness with which it dismissed the Commission's discussion of "puffing." The Commission had written that "'mere puffing' deceives no one and has never been subject to regulation."¹¹⁴ The Commission may have presumed that if it could not bar "puffing," a concerted

¹¹⁰ See *supra* note 92 and accompanying text.

¹¹¹ CDA Supreme Court Brief, *supra* note 104, at 5-6, 40.

¹¹² *Id.* at 40. CDA highlighted *Friedman v. Rogers*, 440 U.S. 1, 3 (1978), a case it did not cite to the Commission or the Ninth Circuit, as an example of an approach properly permitting communication only of underlying factual information. CDA's reply brief argued that "CDA guidelines on quality ads are directed only at those that contain unverifiable claims" and (citing another article not cited to the Commission or the Ninth Circuit) that sellers of "complex services" can use "subjective claims . . . to give erroneous 'signals' of quality." CDA Supreme Court Reply Brief, *supra* note 64, at 13.

¹¹³ 119 S. Ct. at 1614-15.

¹¹⁴ 121 F.T.C. at 318. The Commission cited, among other things, its Policy Statement on Deception, 103 F.T.C. 174, 181 (1984) (appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984)). That Statement explains that certain kinds of advertisements are "unlikely to deceive consumers acting reasonably," and points in particular to "subjective claims" and "correctly stated opinion claims." It also indicates that "[t]he Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously." *Id.* Although the Commission has a substantiation policy, which requires advertisers and their agencies to "have a reasonable basis for advertising claims before they are disseminated," this applies only to claims that "make objective assertions." FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1983) (appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1983)).

group of competitors could not.¹¹⁵ The Supreme Court took a very different view of the matter: "The question here, of course, is not whether puffery may be subject to governmental regulation, but whether a professional organization may ban it."¹¹⁶ Indeed, the Court concluded that "[i]t is . . . entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery," for which proposition it relied upon language in *Bates*.¹¹⁷ It added the surprising observation that banning quality claims might not affect competition if it banned only claims of the sort that "many dentists made."¹¹⁸

The Court majority's unhappiness with professional advertising is essential to an understanding of its opinion in *CDA*.¹¹⁹ It is hard to imagine the Court countenancing sweeping prohibitions of discount or quality claims by a dominant association of sellers of software, computers, or computer servicing; or cellular phones, automobiles, or over-the-counter medicines; or advisors on physical or financial fitness, even though some of these involve products where information disparities loom large, it is difficult to compare products and measure quality, and there may be irrational ties between sellers and buyers. Judges—who are, after all, members of the bar—are especially understanding of complaints about the distastefulness of advertising by lawyers and similar professionals.

Of course, *CDA* is now binding precedent and can be cited by any group of competitors interested in lessening competition, or at least competition on factors communicated to consumers through advertisements. Were *CDA* unusual only because it involved professionals, there would now be a substantial risk that its thinking would spread. But *CDA* is unusual in a second respect as well.

What really happened in *CDA* is that a defendant litigated a case on one theory, relied on a different theory at the Supreme Court, and prevailed at that stage. Had *CDA* seriously sought to justify its actions

¹¹⁵ Cf. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (condemning an association that was "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute'") (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1989)).

¹¹⁶ 119 S. Ct. at 1616 n.14.

¹¹⁷ *Id.* at 1616; see *supra* note 27.

¹¹⁸ 119 S. Ct. at 1616.

¹¹⁹ See David Balto, *Some Observations on California Dental Association v. FTC*, ANTITRUST, Fall 1999, at 64.

to the Commission on the grounds that banning all "puffing" is procompetitive, the Commission could have seriously addressed that proposition. Had CDA argued, not that it allowed claims of subjective quality but that it was justified in banning all of them, Complaint Counsel could have dissected that assertion. Had CDA argued that it enhanced competition by banning "puffing" but encouraging advertising of underlying "facts," or by banning across-the-board discount claims in order to increase advertising of pricing information, Complaint Counsel would have examined the kinds of advertisements that really were run. Had CDA defended its pricing regulations, not on the basis that they prohibit only deceptive advertisements but because the quantity of pricing information that they cause consumers to receive exceeds the quantity that is deterred through its ban of broad discount claims, the Commission would have conducted such a measurement.

The best evidence that such an approach would not have been a winning strategy is that CDA never tried it. Although the Commission and courts will have to take seriously the concerns the Supreme Court expressed in *CDA*, it would be unfortunate if the Court's *CDA* opinion were to make successful a future line of argument that was not even attempted in the litigation of the case before the Court.

It is important not to exaggerate the scope of CDA's victory, however. The Supreme Court majority made clear its discomfort with professional advertising, and its receptivity to justifications for reining it in. The Ninth Circuit was directed, in effect, to give those justifications a second hearing. But CDA did not win that which it really sought: invocation of the full-blown rule of reason, complete with merger-type measurement of market power.

IV. THE ROLE OF MARKET POWER

The central issue argued by CDA at the Commission, in the Court of Appeals, and at the Supreme Court was the role of formal proof of market power. CDA was thus an active participant in the long, slow-moving debate about market power that has occupied antitrust for a score of years.¹²⁰ The status of this debate is briefly summarized below.¹²¹

¹²⁰ Market power and its role in antitrust are nicely discussed in Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 ANTITRUST L.J. 651 (1998).

¹²¹ The debate is thoroughly discussed in William E. Cohen, *Per se* Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis (FTC Staff Discussion Draft, Nov. 1997) <<http://www.ftc.gov/opp/jointvent/persepap.htm>>, and ABA ANTITRUST SECTION, *THE RULE OF REASON* (forthcoming). Other useful contributions include Edward Correia, *Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737 (1998),

A. A QUICK LOOK¹²² AT THE ORIGIN AND DERIVATION
OF THE FLEXIBLE RULE OF REASON

As any law student struggling to master the subject knows, antitrust is an *Alice in Wonderland* world where words do not always mean what they say.¹²³ Nowhere is this more true than with respect to what is known as the rule of reason. Its modern birth was the product of the basic insight that the statutory words at issue could not be accorded their ordinary meaning because that would yield an absurdity. The Sherman Act prohibits all restraints of trade,¹²⁴ yet it is the very nature of even the most procompetitive contract to restrain.¹²⁵ Thus it was said that courts would apply a "rule of reason" to determine which restraints to ban.

In theory, we know what the rule of reason is. At the most general level, teachers can still point to the eloquent teaching of *Chicago Board of Trade*:

The true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied: its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹²⁶

At a more sophisticated level, teachers can point to a burden-shifting model that has achieved considerable acceptance in the courts of appeal:

[U]nder the "traditional" rule of reason, the plaintiff bears the initial burden of proving that an agreement has had or is likely to have a substantially adverse effect on competition. If the plaintiff meets its initial burden, the burden shifts to the defendant to demonstrate the procompetitive virtues of the alleged wrongful conduct. If the defen-

and James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21.

¹²² Few can resist the allure of the phrase "quick look." That is one of its problems.

¹²³ Cf. LEWIS CARROLL, *ALICE IN WONDERLAND* 163 (Norton Critical Ed. 1971) (" 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' ").

¹²⁴ 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

¹²⁵ *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

¹²⁶ 246 U.S. at 238.

dant does demonstrate procompetitive virtues, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective.¹²⁷

Although this has surface appeal as an elegant assignment of responsibilities, beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win. The initial plaintiff's burden of showing actual anticompetitive effects "is often impossible to make . . . due to the difficulty of isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of the defendant's 'market power' instead."¹²⁸

The judicial invitation to plaintiffs to prove market power does plaintiffs no favor, however. As a practical matter, making market power an issue means that defendants can and do hire talented economists who help them win motions to dismiss or summary judgment on grounds of market shares of perhaps 20–30 percent or less,¹²⁹ or ease of entry, or elastic supply or demand, or powerful buyers, or excess capacity, or changing conditions. Any plaintiff filing a "full blown" rule of reason case faces the prospect of long, expensive discovery, extensive motions practice, and then a merger-like battle over market power without the benefit of the prophylactic language of Clayton Act Section 7. Making a decision turn on a full, formal proof of market power, the antitrust equivalent of the Full Monty, is a defendant's paradise.¹³⁰

¹²⁷ ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 53 (4th ed. 1997) (footnotes omitted); see also, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("Under this approach, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.") (citations omitted); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (same).

¹²⁸ E.g., *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (citations omitted). The use of market power to screen meritorious cases from frivolous ones was advocated with particular vigor by now-Judge Easterbrook. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

¹²⁹ See, e.g., *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986) (affirming summary judgment because Miller Beer, with a 19.1% market share, lacked market power); see also Richard Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467, 513–18 (1990); cf. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (tying case finding that defendant with market share of approximately 30% lacked market power).

¹³⁰ For an empirical demonstration that courts almost always dispose of rule of reason cases without reaching the stage of balancing procompetitive and anticompetitive effects,

Plaintiffs' lawyers and prosecutors have not survived by being fools, so they sought to avoid the full-blown rule of reason by aggressive invocation of the per se rule. That movement came to an end with *Broadcast Music, Inc. v. Columbia Broadcasting System*.¹³¹ During the 1980s and 1990s, the courts have gradually cut back on the reach of the per se rule.¹³²

Inevitably, plaintiffs and prosecutors have struggled to find some alternative way to win. Courts have occasionally accommodated them, although there have been far fewer litigated victories than speeches, articles, and consent orders. Three Supreme Court cases are associated with what has been known variously as the "quick look" or the "truncated" or "abbreviated" or "structured" or "flexible" rule of reason. Each case is problematic. The agencies and the lower courts also have sought, without complete success, to fashion this middle ground.

1. *In the Supreme Court*

The first case sometimes associated with this middle category spent most of its life as a per se case. In *National Society of Professional Engineers v. United States*¹³³ the lower courts had condemned, as per se illegal, an ethical rule prohibiting competitive bidding.¹³⁴ The government defended the result solely on the ground that the per se rule applied.¹³⁵ The Supreme Court affirmed. It held that the lower courts had properly refused to consider the engineers' proffered justification that they were members of a learned profession acting to prevent competition from endangering public safety. But, for some unexplained reason, Justice Stevens, writing for the Court, said that "the asserted defense rests on a fundamental misunderstanding of the Rule of Reason."¹³⁶ The Court added that professionals' "[e]thical norms may serve to regulate and

see Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect* (unpublished manuscript on file with the author).

¹³¹ 441 U.S. 1 (1979).

¹³² *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (vertical boycotts); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale prices); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (certain group boycotts); *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (certain necessary restraints). *But cf.* *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (horizontal market division); *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (horizontal price fixing). For a commentary suggesting that *Khan* is a significant rejection of the value of trader freedom, see Alan J. Meese, *Economic Theory, Trader Freedom, and Consumer Welfare: State Oil Co. v. Khan and the Continuing Incoherence of Antitrust Doctrine*, 84 CORNELL L. REV. 763 (1999).

¹³³ 435 U.S. 679 (1978) (Stevens, J.).

¹³⁴ 404 F. Supp. 457 (D.D.C. 1975), *aff'd in part and remanded in part*, 555 F.2d 978 (D.C. Cir. 1977).

¹³⁵ Brief for the United States, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (No. 76-1767).

¹³⁶ *Professional Engineers*, 435 U.S. at 681.

promote . . . competition, and thus fall within the Rule of Reason.”¹³⁷ Yet it also said that “[o]n its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act”: “While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”¹³⁸

Ever since *Professional Engineers* was issued, observers have disagreed as to whether it is a rule of reason or a per se case.¹³⁹ Ironically, during the CDA oral argument Justice Stevens, author of *Professional Engineers*, asked CDA counsel whether or not he viewed *Professional Engineers* as “a quick look case.”¹⁴⁰

In *NCAA v. Board of Regents*,¹⁴¹ the Supreme Court refused to apply the per se rule to a horizontal agreement among colleges jointly to market television rights to intercollegiate football games. Nonetheless, the Court ruled that defendants’ claimed lack of market power was irrelevant because, “[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output,” and the challenged agreement was such a restraint.¹⁴² Quoting *Professional Engineers*, the Court wrote that “when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’”¹⁴³ Citing an unusually ambitious Solicitor General amicus brief (which set out a structured approach to a flexible rule of reason¹⁴⁴), the Court wrote that a “naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”¹⁴⁵ The Court did not adequately explain why a “naked restriction on price or output” should not be condemned as per se illegal.¹⁴⁶

¹³⁷ *Id.* at 696.

¹³⁸ *Id.* at 692–93.

¹³⁹ Compare, e.g., *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 357, 362 (1982) (Powell, J., dissenting) (per se) and *Catalano, Inc. v. Target Sales, Inc.* 446 U.S. 643, 647 (1980) (per curiam) (same) with, e.g., *Indiana Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (citing *Professional Engineers* for proposition that Court has been “slow to condemn rules adopted by professional associations as unreasonable per se”) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60, 65–66 (1982) (Rehnquist, J., dissenting) (*Professional Engineers* limits factors that may be considered under rule of reason).

¹⁴⁰ Supreme Court Transcript, *supra* note 54, at 29.

¹⁴¹ 468 U.S. 85 (1984).

¹⁴² *Id.* at 109–10.

¹⁴³ *Id.* at 109.

¹⁴⁴ See *infra* at notes 154–57 and accompanying text.

¹⁴⁵ 468 U.S. at 110 & n.42.

¹⁴⁶ See Wesley J. Liebler, *Horizontal Restrictions, Efficiency, and the Per Se Rule*, 33 UCLA L. Rev. 1019 (1986) (agreement should have been per se illegal).

Even stranger, the Court nonetheless proceeded to find that the NCAA in fact had market power.¹⁴⁷

The Court engaged in a similar exercise in *FTC v. Indiana Federation of Dentists*,¹⁴⁸ in which it affirmed an FTC finding that a collective refusal by dentists to make X-rays freely available to insurance companies violated Section 5 of the FTC Act. "A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare"¹⁴⁹ The Commission's failure to engage in "elaborate market analysis" was unimportant for two independent reasons. First, the dentists' agreement was a "naked restriction on price or output," which "'requires some competitive justification even in the absence of a detailed market analysis.'"¹⁵⁰ Second, there were what the Court described as "actual, sustained adverse effects on competition," which can "obviate the need for an inquiry into market power."¹⁵¹ But the Court's discussion of competitive effects was *not* referring to customary measures, such as increased prices or reduced output (which measures, the Seventh Circuit had said, did not indicate harm to competition). Rather, the only effect on competition was that insurers were "actually unable to obtain compliance with their requests for submission of x-rays."¹⁵² In other words, it was sufficient to show that the dentists had adhered to their agreement. The Court was untroubled by the lack of evidence that prices had increased.¹⁵³ As in *NCAA*, the Court really was applying what one might term a "thoughtful per se rule," and in the process analyzed the likely competitive effect of the challenged conduct while denying the necessity of doing so.

2. In the Agencies

The antitrust enforcement agencies have wrestled with various formulations for a middle category. One of the most ambitious efforts occurred

¹⁴⁷ *NCAA*, 468 U.S. at 111-13.

¹⁴⁸ 476 U.S. 447 (1986).

¹⁴⁹ *Id.* at 459.

¹⁵⁰ *Id.* at 460 (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984)).

¹⁵¹ *Id.* at 461 (quoting PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986), where market power was described as "but a 'surrogate for detrimental effects'").

¹⁵² *Id.* at 460.

¹⁵³ *Id.* at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.") (citation to *Professional Engineers* omitted).

in the amicus brief that the Solicitor General, with the Federal Trade Commission, filed in *NCAA*.¹⁵⁴ Relying on, among other things, the work of Professors Sullivan and Areeda,¹⁵⁵ the SG advocated a “middle ground” that he referred to variously as an “abbreviated” and a “truncated” rule of reason:

[C]ourts should first ask whether challenged conduct is likely, absent an efficiency justification,¹⁵⁶ to lead to the restriction of output, for such conduct is inherently suspect. Where output restriction does appear likely, we must ask whether there is a plausible efficiency justification for the practice, *i.e.*, is there reason to believe that the restraint may nonetheless have significant efficiency benefits and therefore enhance competition and output. In the event that there is no plausible efficiency justification, the suspect practice is *per se* illegal. . . .

But, in cases where the participants raise a plausible efficiency justification for conduct that is facially suspect, *per se* characterization is inappropriate, because more scrutiny is needed to evaluate the restraint's overall competitive effect. It may be that further examination will show that the proffered efficiency justification should be rejected; in that event, the conduct can still be condemned as unreasonable without completing a “full” rule of reason analysis that includes market definition and market power determinations. On the other hand, if efficiency benefits are shown to be likely, a more elaborate rule of reason inquiry is called for, with a thorough analysis of market power, in order to determine whether the practice is, on balance, harmful or beneficial.¹⁵⁷

The Federal Trade Commission, which had joined in the SG's *NCAA* amicus brief, built upon that approach and formally adopted a structured series of questions in *Massachusetts Board of Registration in Optometry*:

First, we ask whether the restraint is “inherently suspect.” In other words, is the practice the kind that appears likely, absent an efficiency

¹⁵⁴ Brief for the United States as Amicus Curiae, *NCAA v. Board of Regents* [hereinafter Amicus Brief.] Earlier steps were taken by the Federal Trade Commission. See *American Med. Ass'n*, 94 F.T.C. 701, 1004 (1979) (Clanton, Comm'r) (“the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint”), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *Michigan State Med. Soc'y*, 101 F.T.C. 191, 292 (1983) (Clanton, Comm'r) (“Where horizontal arrangements so closely relate to prices or fees as they do here, a less elaborate analysis of competitive effects is required.” (citing *Professional Engineers*)).

¹⁵⁵ Amicus Brief, *supra* note 154, at 7 n.6 (citing LAWRENCE SULLIVAN, ANTITRUST 192 (1977); Phillip Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37–38 (Federal Judicial Center June 1981)).

¹⁵⁶ An efficiency justification exists if the challenged restraint increases the quantity or quality, or reduces the cost, of overall output—e.g., by creating a new product, improving the operation of a market, or reducing production or marketing costs—and is reasonably necessary to achieve such efficiencies.

¹⁵⁷ Brief for the National Collegiate Athletic Ass'n as Amicus Curiae in Support of Reversal, *CDA*, No. 97-1625, at 16 [hereinafter *NCAA Amicus Brief*] (footnote in original).

justification, to "restrict competition and decrease output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.¹⁵⁸

Later that same year, the Antitrust Division issued a new version of its Antitrust Enforcement Guidelines for International Operations. These formally set forth the Division's somewhat differently structured set of questions, which the Division said it would apply in making a rule of reason analysis of a joint venture.¹⁵⁹ Although this set off a series of debates about the differences and advantages of the sets of dueling

¹⁵⁸ 110 F.T.C. 549, 604 (1988) (Calvani, Cmm'r). The most vigorous criticism of the FTC's "Mass. Board" approach is Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613 (1996); see also John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301, 375-79 (1991) (preferring more weight to market power). The approach is defended with equal vigor in Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of Massachusetts Board*, 66 ANTITRUST L.J. 773 (1998); Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1989); and James L. Langenfeld & Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L.J. 653 (1993).

¹⁵⁹ 4 Trade Reg. Rep. (CCH) ¶ 13,109, at 20,600 (footnote omitted):

First, the Department determines whether the joint venture would likely have any anticompetitive effect in the market or markets in which the joint venture proposes to operate or in which the economic integration of the parties' operations occurs (the "joint venture markets"). Second, the Department determines whether the joint venture or any of its restraints would likely have an anticompetitive effect in any other market or markets ("spillover markets") in which the joint venture members are actual or potential competitors outside of the joint venture. Third, using the analysis described in Section 3.5 of the Guidelines, the Department analyzes the likely competitive effects of any nonprice vertical restraints imposed in connection with the joint venture. The Department will not challenge a joint venture if under the first three steps, the Department concludes that the joint venture would not likely have any significant anticompetitive effects. If, however, the Department's analysis under the first three steps reveals significant anticompetitive risks, then, under step 4, the Department considers whether any procompetitive efficiencies that the parties claim would be achieved by the joint venture would outweigh the risk of anticompetitive harm.

questions,¹⁶⁰ the important point was that, unlike the FTC in *Mass. Board*, the Division preferred to examine efficiencies last rather than first.

Somewhat ironically, shortly after the FTC refrained from applying *Mass. Board* in *CDA*,¹⁶¹ AAG Joel Klein unveiled a Justice Department approach that departed sharply from the Division's former approach and adopted a series of questions that bore some resemblance to those in *Mass. Board*.¹⁶² Klein's "stepwise approach" stimulated substantial discussion and an unusually vigorous and insightful "point-counterpoint" debate that was cited in a *CDA* amicus brief and then by the Court itself.¹⁶³

3. In the Lower Courts

The suggestion of a third form of analysis, between the per se rule and the full-blown rule of reason, first appeared in *United States v. Realty*

¹⁶⁰ See, e.g., Joe Sims, *Developments in Agreements Among Competitors*, 58 ANTITRUST L.J. 433, 439 (1989):

I have heard Mr. Zuckerman and his counterparts at the Department explain that there are serious and significant distinctions. But does it matter? Do you care, do I care, does anybody care? We are at the "head of a pin" stage, unfortunately, and I don't think "rules" like these are likely to be too useful.

¹⁶¹ See *supra* note 20.

¹⁶² Klein said that the Division asks three questions:

[1] Is this "the type of restraint that is currently recognized by the courts as being a per se violation, such as an unadorned agreement to fix prices, curtail output, or divide markets?" If so, it is illegal.

[2] If we conclude that a horizontal agreement that directly limits competition on price or output between or among competitors is not per se illegal, we then inquire whether there's a procompetitive justification for the agreement. We put that question to the party defending the agreement, and we expect a response that doesn't merely speculate about the existence of efficiencies, but rather comes forward with real-world evidence—factual evidence, expert economic evidence, and preferably both—to support the claim . . . And, if we find that the proffered procompetitive justifications are unsubstantiated, we conclude that the agreement should be struck down.

[3] [I]f we find there are significant procompetitive benefits to the agreement, we then . . . seek to determine whether its likely anticompetitive effects outweigh its procompetitive benefits. This weighing and balancing . . . often requires an elaborate market analysis, unless, of course, there is convincing evidence of a direct market effect on price or output. But in either event, the key point I want to stress here is that only if there are real procompetitive benefits should there be any need to show actual anticompetitive effects.

Joel I. Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address Before the ABA Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996) <<http://www.usdoj.gov/atr/public/speeches/jikaba.htm>>, reprinted in [Current Comment] Trade Reg. Rep. (CCH) ¶ 50,157 [hereinafter Klein, Stepwise Speech].

¹⁶³ Joel I. Klein, *Point: A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41; William J. Kolasky, Jr., *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 31, cited in NCAA Amicus Brief, *supra* note 157, at 17 & 19, and *CDA*, 119 S. Ct. at 1617 n.15.

*Multi-List, Inc.*¹⁶⁴ The Fifth Circuit espoused the concept of a "facial unreasonableness theory" under which a court may condemn an unjustified restraint without proof of actual anticompetitive effect, where the conspirators possessed the ability to harm competition. The court quoted Professor Sullivan's observation that on the question whether defendants had sufficient market power, "a truncated or threshold analysis will suffice."¹⁶⁵

The first judge to use the term "quick look" was Judge Posner, in a pair of opinions he issued shortly after the Supreme Court decided *NCAA*.¹⁶⁶ In *Vogel v. American Society of Appraisers*¹⁶⁷ the Seventh Circuit considered an appraiser association's ethical rule barring fees as a percentage of appraisals. The court cited *BMI* and *NCAA* for the proposition that before proceeding to apply the per se rule against price fixing, "we should take a quick look to see whether it has clear anticompetitive consequences and lacks any redeeming competitive virtues."¹⁶⁸ The Court's "quick look" revealed the existence of a sound justification for the rule (avoidance of improper incentives or the appearance of fraud), that the rule probably would not actually affect fees (but only the method of computing them), and that if the rule had any effect on fees, it would tend to depress them (because percentage fees tend to inflate appraisals and thus the dollar amount of fees). Accordingly, the lower court was correct in refraining from applying the per se rule.

In contrast, in *General Leaseways, Inc. v. National Truck Leasing Association*,¹⁶⁹ the Seventh Circuit took a "quick look" at the facts at issue and then condemned as per se illegal a territorial market division allegedly justified by the need for local member truck-leasing firms to prevent free riding. Judge Posner wrote that the defense was unpersuasive because only services were being provided and members could charge separately for them (unlike for information, which poses more serious free-rider problems). Without the free-rider defense, there was no justification for the restraints.

¹⁶⁴ 629 F.2d 1351 (5th Cir. 1980) (Goldberg, J.). The *Realty Multi-List* court said that the form of analysis it outlined was "quite similar to that first envisioned under the rule of reason by Judge Taft in his opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)." 629 F.2d at 1375 n.49.

¹⁶⁵ 629 F.2d at 1372 n.39 (quoting LAWRENCE SULLIVAN, ANTITRUST 192 (1977)).

¹⁶⁶ The Seventh Circuit was just a little quicker than the District Court of Connecticut, which declined to take a "quick look" at market effects in a price-fixing case in *United States v. Stop & Shop Cos.*, 1985-2 Trade Cas. (CCH) ¶ 66,689 (D. Conn. 1984).

¹⁶⁷ 744 F.2d 598 (7th Cir. 1984).

¹⁶⁸ *Id.* at 603.

¹⁶⁹ 744 F.2d 588 (7th Cir. 1984).

More recently, the notion of a flexible rule of reason is associated with two cases, *Chicago Professional Sports Ltd. Partnership v. NBA*¹⁷⁰ and *Law v. NCAA*.¹⁷¹ In the former, the Seventh Circuit, in an opinion by Judge Easterbrook, affirmed the district court's "'quick look' version of the Rule of Reason"¹⁷² to strike down an NBA limitation on the number of games "superstations" can carry. The court acknowledged that the rule of reason normally begins by looking at market power, and there was a substantial argument that the League had none (since it was competing for TV viewers) and was improving its product. But the court pointed to *NCAA* as having rejected a similar argument (ironically presented by then-private citizen Easterbrook). *NCAA* taught that "any agreement to reduce output measured by the number of television games requires some justification—some explanation connecting the practice to consumers' benefits—before the court attempts an analysis of market power."¹⁷³ The court then engaged in quite a searching consideration of the preciseness of the fit between the NBA's actions and its alleged justification, and, finding it wanting, affirmed the district court.¹⁷⁴

¹⁷⁰ 961 F.2d 667 (7th Cir. 1992) (Easterbrook, J.).

¹⁷¹ 134 F.3d 1010 (10th Cir. 1998).

¹⁷² 961 F.2d at 676.

¹⁷³ *Id.* at 674 ("Unless there are sound justifications, the court condemns the practice without ado, using the 'quick look' version of the Rule of Reason advocated by Professor Areeda and by the Solicitor General's brief in *NCAA*. See 668 U.S. at 109–11 nn.39 & 42; Phillip E. Areeda, 7 *Antitrust Law* ¶ 1508 (1986)."). Professor Areeda suggested that a restraint "of the kind that has been regarded as very serious and usually without recognized redeeming virtue . . . may nevertheless avoid summary condemnation if the defendant claims justification of the kind which a 'quick look'—usually at the arguments alone—shows to be legitimate in principle and capable of being proved satisfactorily." 7 PHILLIP E. AREEDA, ANTITRUST LAW 428–29 (1986).

¹⁷⁴ On remand, the NBA argued that it should be treated as a single entity rather than a cartel. The district court disagreed, but the Seventh Circuit, again in an opinion by Judge Easterbrook, ruled that "the NBA is sufficiently integrated that its superstition rules may not be condemned without analysis under the full Rule of Reason." 95 F.3d 593, 600 (7th Cir. 1996). The Court added that "[s]ubstantial market power is an indispensable ingredient of every claim under the full Rule of Reason." *Id.*

Previous opinions by Judge Easterbrook had treated arguments for a "quick look" relatively unsympathetically. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) (Easterbrook, J.), the Seventh Circuit had affirmed the denial of a preliminary injunction. After addressing claims of per se illegality, the court continued by looking at at "short form or quick look Rule of Reason analysis" that looks directly at alleged adverse effects. The plaintiff did not fare well. "Unless the practice 'almost always' makes consumers worse off, it is not subject to condemnation without more detailed study of its effects—including proof of market power and actual injury." *Id.* at 727 (quoting *Broadcast Music*). *Polk Bros. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.), reversed a denial of an injunction to enforce a covenant that reserved to each of two parties the right to sell certain products. The court essentially ruled that the restraints were ancillary rather than naked, so they were not per se illegal and had to be judged under the rule of reason. The court mentioned the "quick look" only briefly, making the same point as in *Illinois Corporate Travel*. The court stressed the

Law v. NCAA relied upon *Chicago Professional Sports* to apply what it said was a "quick look rule of reason" to an arrangement that capped the salaries paid to a particular small category of basketball coaches. The court applied the rule of reason because horizontal restraints were necessary, but it affirmed summary judgment against the NCAA even though the NCAA insisted that its market share and corresponding power was low:

The NCAA misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on competition. . . . Thus, where a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a "quick look" rule of reason.¹⁷⁵

The Tenth Circuit appeared not just to examine the justifications for the challenged restraints, but to place on the defendant the burden of proving that the benefits of those restraints outweigh their anticompetitive effects.¹⁷⁶

The "quick look" (or a variation thereof) has fared less well in other cases, however. Three are worthy of special note. The Commission's bold use of *Mass. Board in Detroit Auto Dealers Association*¹⁷⁷ met with a chilly reception in the Sixth Circuit, which regarded the Commission's "inherently suspect" categorization as an improper application of a per se approach.¹⁷⁸ The court affirmed the Commission's decision in substantial

importance of market power to the rule of reason: "The first step in any Rule of Reason case is an assessment of market power. Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial." *Id.* at 191 (citations omitted).

A plaintiff's attempt to invoke the "quick look" also met with no success in *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993). The First Circuit, in an opinion by Judge Boudin, wrote that in *NCAA* and *IFD* the Supreme Court had "actually contracted the per se rule by refusing to apply it to horizontal agreements that involved price and output fixing . . . or the setting of other terms of trade . . ." *Id.* at 594–95. The "quick look" had no applicability to the case before the court, which involved exclusive dealing that could be judged only under the normal rule of reason.

¹⁷⁵ 134 F.3d at 1020.

¹⁷⁶ See *id.* at 1024 (Another court "erred as a matter of law to the extent that the court tried to free the NCAA . . . from its burden of showing that the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects. The Supreme Court . . . made it clear that the NCAA still shoulders that burden . . . and we hold that the NCAA failed to provide sufficient evidence to carry its burden in this case.") (citation omitted).

¹⁷⁷ *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417 (1989), *aff'd in part and remanded*, 955 F.2d 457 (6th Cir. 1992), *modified on remand*, 119 F.T.C. 891 (1995), *remanded with direction for a hearing for further modification*, 84 F.3d 787 (6th Cir. 1996).

¹⁷⁸ 955 F.2d at 471.

part, but only grudgingly and without endorsing the Commission's reasoning,¹⁷⁹ and it raised (for consideration on remand) serious questions about the Commission's remedy. In *United States v. Brown University*¹⁸⁰ the Third Circuit reversed a district court's application of the "quick look" and remanded for consideration under the full rule of reason. The court held that "[i]f the defendant offers sound procompetitive justifications, . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis."¹⁸¹ The Third Circuit rather searchingly scrutinized the special nature of higher education and the "asserted procompetitive and pro-consumer features" of an Ivy League financial aid arrangement, and concluded that "the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT (the defendant)."¹⁸²

Finally, a lower court's refusal to use a "quick look" was endorsed in *American Ad Management, Inc. v. GTE Corp.*¹⁸³ The Ninth Circuit pointedly wrote that "this so-called 'quick look' analysis is the exception, rather than the rule,"¹⁸⁴ although the court went on to reverse the summary judgment won by the defendant because there were serious factual disputes about market definition, competitive effects, and the reasonableness of the restraint.

When CDA lost at the Commission in a decision the Commission characterized as applying a "quick look," CDA appealed to the Ninth Circuit and highlighted this limiting language in *American Ad Management*. CDA argued that its dispute with FTC Complaint Counsel deserved scrutiny under the full-blown rule of reason.

B. A SETBACK FOR THE "QUICK LOOK" MOVEMENT

CDA will certainly be characterized as a setback for what one might consider the "quick look" antitrust movement. Indeed, the Court specifi-

¹⁷⁹ In contrast, Judge Ryan wrote a vigorous opinion explaining that he would have affirmed the Commission's decision in its entirety. *Id.* at 473 (Ryan, J., concurring in part and dissenting in part).

¹⁸⁰ 5 F.3d 658 (3d Cir. 1993).

¹⁸¹ *Id.* at 669; *followed*, *Bogan v. Hodgkins*, 166 F.3d 509, 514 n.6 (2d Cir. 1999) (quick look inappropriate because defendant had set forth "sound allegations of procompetitive benefit").

¹⁸² 5 F.3d at 678; *see also* 119 S. Ct. at 1613 (citing *Brown University* as "finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agreements in *National Soc. of Professional Engineers* and *Indiana Federation of Dentists* 'embodied a strong economic self-interest of the parties to them.'") (quoting *Brown University*, 5 F.3d at 677-78).

¹⁸³ 92 F.3d 781 (9th Cir. 1996).

¹⁸⁴ *Id.* at 789.

cally said that it "decide[d] that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable)."¹⁸⁵ The Court reviewed the *Pro Engineers/NCAA/Indiana Federation of Dentists* trilogy, quoting NCAA's reference to "naked restraints," and summarized them as follows:

In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.¹⁸⁶

In such cases, the Court wrote, "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained."¹⁸⁷ The Court said that CDA "fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious."¹⁸⁸

Critics of the quick look can point to three additional aspects of the Court's opinion. First, the Court showed great sensitivity to the power of burden shifting. The court of appeals had observed that CDA appeared to prohibit all across-the-board discounts and that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing."¹⁸⁹ The Supreme Court sharply criticized the court of appeals for what the Supreme Court saw as resort to burden shifting to the answer this critical question: "the absence of any empirical evidence on this point indicates that the question was not answered, but merely avoided by implicit burden-shifting."¹⁹⁰ When the Court's restrictive language about the applicability of the "quick look" is linked to this sharp criticism of premature burden shifting,¹⁹¹ foes of the "quick look" take comfort.

¹⁸⁵ 119 S. Ct. at 1612.

¹⁸⁶ *Id.* This language was quoted in *Granite Partners, L.P. v. Bear, Stearns & Co.*, 7 Trade Reg. Rep. (CCH) ¶ 72,604, at 85,435 (S.D.N.Y. July 29, 1999), where the court, having denied per se review because the anticompetitive impact of a conspiracy was "neither obvious nor easily ascertainable," refused to "engage in yet another form of truncated antitrust analysis."

¹⁸⁷ 119 S. Ct. at 1613.

¹⁸⁸ *Id.*; see also *id.* at 1617 ("The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.").

¹⁸⁹ 128 F.3d at 728.

¹⁹⁰ 119 S. Ct. at 1615 n.12; see also *id.* at 1615 ("the court's adversion to empirical evidence at the moment of this implicit burden-shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects").

¹⁹¹ *Id.* at 1615 n.12 ("The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indica-

Second, as has been noted by others, the Court used the word "plausible" five times.¹⁹² Thus, the Court said that "CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect";¹⁹³ and that the suggestion that CDA's rules might increase consumer information "may or may not be correct, but it is not implausible."¹⁹⁴ A strongly written amicus brief filed by the NCAA, which the Court presumably read, had focused sharply on the word "plausible" and argued repeatedly that "full rule-of-reason analysis must supersede the 'quick look' review if the defendant presents a plausible procompetitive justification."¹⁹⁵ It argued that the approach adopted by the Tenth Circuit in a case it had lost and the "stepwise" approach advanced by AAG Joel Klein¹⁹⁶ required too much of defendants and could chill competition.¹⁹⁷ It is not absurd to speculate that the Court, through its repeated mentioning of "plausible," might have bought into some of this reasoning—although, as is discussed below, the Court deliberately refrained from going as far as amici desired.

Pro-defendant speculation is bolstered by the Supreme Court majority's somewhat brusque treatment of AAG Joel Klein. As noted, AAG

tion that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.").

¹⁹² See William J. Kolasky, *California Dental Ass'n v. FTC: The New Antitrust Empiricism*, ANTITRUST, Fall 1999, at 68.

¹⁹³ 119 S. Ct. at 1613.

¹⁹⁴ *Id.* at 1615; see also *id.* (court of appeals "indirectly acknowledged the plausibility of procompetitive justifications"); *id.* at 1617 (criticizing the court of appeals for giving no weight to an "at least equally plausible suggestion"); *id.* ("the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated").

¹⁹⁵ NCAA Amicus Brief, *supra* note 157, at 5; see also *id.* at 6 ("If a defendant can state a facially plausible procompetitive justification for the challenged restraint, the 'quick look' should be over and the restraint examined in full. A defendant should not have to produce factual support sufficient to prevail after a full rule-of-reason analysis before the plaintiff is put to its proof of actual anticompetitive effects."); *id.* at 16 ("a defendant can terminate the 'quick look' and return to the full rule of reason by advancing a plausible procompetitive justification for the challenged restraint"); see also Brief of the American Dental Association et al. as Amici Curiae in Support of Petitioners, *CDA*, Dkt. 97-1625, at 20 n.10 [hereinafter ADA Amicus Brief] ("Other courts of appeals have faithfully followed this Court's teaching that quick-look analysis is inappropriate unless a restraint is inherently suspect and unsupported by any procompetitive justification.").

The NCAA properly acknowledged its special interest as a party that had lost a flexible rule of reason case, a phase of which continued. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998). The Supreme Court eventually denied the NCAA's petition for certiorari from that decision. 119 S. Ct. 65 (1998).

¹⁹⁶ See *supra* notes 162–63 and accompanying text.

¹⁹⁷ The SG disagreed and distinguished the cases on which the NCAA relied. "Neither case suggests that an exhaustive market analysis is required whenever a defendant asserts a procompetitive theory." SG Brief, *supra* note 64, at 34 n.27; see also Brief of the States

Klein had weighed into the debates about structuring a rule of reason inquiry with a speech that was the subject of a published point-counterpoint debate. To support its conclusion that the rule of reason "is always something of a sliding scale,"¹⁹⁸ the Court observed that commentators have expressed similar views, and cited a law review article and the anti-DOJ "counterpoint."¹⁹⁹ The Court appended a "But see" citation to the Klein "point," with a parenthetical that does not suggest disagreement about the need for a sliding scale.²⁰⁰

AAG Klein's "stepwise" approach to rule of reason analysis had been called to the Court's attention several times during the term. The NCAA's amicus brief and the "counterpoint" cited by the Court had criticized it for too quickly forcing defendants to come forward with hard evidence of procompetitive purposes.²⁰¹ Earlier, in his opposition to CDA's petition for certiorari, the Solicitor General had touted AAG Klein's "Point" as "advocating a similar practical approach and citing the decision below

of Arizona et al. as Amici Curiae in Support of Respondent, *CDA*, No. 97-1625, at 19 (objecting to the suggestion that "a mere assertion of a pro-competitive justification by the defendant should automatically require a thorough market analysis").

¹⁹⁸ 119 S. Ct. at 1617 (quoting PHILLIP AREEDA, *ANTITRUST LAW* ¶ 1507, at 402 (1986)).

¹⁹⁹ *Id.* at 1617 n.15 (citing Kolasky, *supra* note 163, at 43; Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1771 (1994)).

²⁰⁰ 119 S. Ct. at 1617 n.15 ("But see Klein . . . (examination of procompetitive justifications 'is by no means a full scrutiny of the proffered efficiency justification. It is, rather, a hard look at the justification to determine if it meets the defendant's burden of coming forward with—but not establishing—a valid efficiency justification.')"). In fact, Klein almost surely agrees with the Court's observation that there is a sliding scale. *Cf.* Klein, *Stepwise Speech*, *supra* note 162, at 6 (the Court has "made clear that there is 'often no bright line separat[ing] per se from Rule of Reason analysis'" (quoting *NCAA*, 468 U.S. at 104 n.26) (brackets by Klein))).

²⁰¹ NCAA Amicus Brief, *supra* note 157, at 18 (citations omitted);

The "stepwise approach" now favored by the Antitrust Division also would permit a summary finding of liability unless the defendant proves "with real world evidence—factual evidence, expert economic evidence, or preferably both"—that the restraint actually serves a procompetitive purpose.

This is too much. Requiring defendants to prove the benefits of their conduct before plaintiffs show that conduct actually harms competition stands the procompetitive principles of the antitrust laws on their head. This burden-shifting standard presents a particularly acute risk of deterring innovative, proconsumer collaboration.

Kolasky, *supra* note 163, at 43 ("The fundamental problem with the Department's stepwise approach is that it proposes in the case of certain horizontal agreements to dispense with a critical step of this analysis and to impose on the defendant the burden of proving 'with real world evidence—factual evidence, expert economic evidence, or preferably both—that the restraint serves a procompetitive purpose, even in the absence of any showing that the restraint is likely to cause any substantial harm to competition.'" (citations omitted)).

with approval.”²⁰² Yet, earlier in the term, the SG had relied on AAG Klein’s “Stepwise” approach as justifying the Second Circuit’s decision in *Discon v. NYNEX*²⁰³ and making certiorari unwarranted.²⁰⁴ The Court had apparently disagreed, since it granted certiorari and unanimously vacated the judgment.²⁰⁵ Especially in light of all the attention that AAG Klein’s “Stepwise” approach attracted this term, the Court’s odd “But see” citation of Klein’s “Point” and its favorable citation of the opposing “Counterpoint” suggest some discomfort with Klein’s approach, at least as it was portrayed by its critics.

C. A SETBACK FOR MARKET POWER SCREENS

Although many specific points in the Court’s opinion can provide comfort to critics of the “quick look,” undue attention to these should not distract from the central lesson of *CDA*. From the beginning, *CDA* was about market power. *CDA*’s counsel litigated this case by arguing that first Complaint Counsel and then the Commission must lose because no FTC economist expert had been called, no localized markets had been defined, and no entry barriers had been precisely calibrated. *CDA* asked the Commission, the Ninth Circuit, and then the Supreme Court to rule in its favor on grounds of failure to prove market power. Because

²⁰² Brief for the Federal Trade Commission in Opposition to Certiorari, *CDA*, Dkt. 97-1625, at 20. The SG’s subsequent brief refrained from citing Klein.

²⁰³ 93 F.3d 1055 (2d Cir. 1996), *vacated and remanded*, 525 U.S. 128 (1998).

²⁰⁴ Brief for the United States and the FTC as Amici Curiae, *NYNEX Corp. v. Discon, Inc.*, No. 96-1570 (1998) (opposing certiorari) <<http://www.usdoj.gov/atr/cases/fl600/1612.htm>>. The SG agreed that the Second Circuit was mistaken when it suggested that *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), could make certain non-horizontal boycotts per se illegal, but he rationalized the Second Circuit’s outcome as a proper application of a version of the rule of reason:

[T]he approach suggested by the court of appeals here is consistent with that suggested by this Court’s opinions in [*Indiana Federation of Dentists* and *NCAA*]. In those cases, the court indicated that, once the defendants’ conduct has been shown to be anticompetitive based on its character or its effects, the conduct will be deemed to be unreasonable without any extensive market analysis, unless the defendants advance an adequate procompetitive justification.

Brief at 16. The SG cited AAG Klein’s “Stepwise” speech and added that the Division “uses such an approach to analyze certain types of horizontal restraints.” *Id.* at 17.

The SG’s suggestion and AAG Klein’s “Stepwise” approach were criticized as “turning the ordinary antitrust burden of proof upside down.” Brief of Amicus Curiae GTE Corp. in Support of Petitioners, *NYNEX Corp.*, No. 96-1570, at 13.

²⁰⁵ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (only horizontal group boycotts can be illegal per se). In his brief on the merits, the SG supported vacating the judgment and limiting *Klor’s* to horizontal group boycotts. Brief for the United States and the FTC as Amici Curiae in Support of Vacating the Judgment, *NYNEX Corp.*, No. 96-1570. The brief does not cite AAG Klein’s writings.

understanding the extent to which the *CDA* litigation was about the role of market power is important to understanding the Court's opinion, that litigation is discussed in some detail before the Court's opinion is discussed directly.

1. *Market Power in the CDA Litigation*

CDA's appellate strategy at the Commission, in the Ninth Circuit, and even in the Supreme Court was audaciously simple. First, it read ALJ Parker's findings that CDA lacked market power, and that Complaint Counsel had thus failed to satisfy the rule of reason,²⁰⁶ for all they were worth. It treated the reportorial "Findings" 322 and 326²⁰⁷ not as mere recitation of what a defense expert had said, but as though ALJ Parker had adopted Professor Knox's conclusions as his own and found that competition had not been affected. Once that transformation had been accomplished, CDA's argument seemed overwhelming: How could the Commission condemn something that the ALJ had found (1) had been adopted by an association with no market power and (2) had had no effect on competition?

(a) At the Commission

It is hard to overemphasize the centrality of Judge Parker's purported findings about market power and competitive effect to CDA's written and oral presentations to the Commission. Market power was the first point CDA addressed at argument.²⁰⁸ The principal thrust of CDA's brief was that Judge Parker had found market power to be absent, so CDA should win. CDA's appellate brief discusses its claimed lack of market power on 26 of the first 31 pages of its argument.²⁰⁹ The first Argument heading announces that "The Rule of Reason Is The Applicable Analysis In This Case," and that heading occupies 31 of the 52 argument pages not addressed to jurisdiction.²¹⁰ CDA's appellate brief quoted both Findings 322 and 326 in their entirety (omitting the words "Professor Knox

²⁰⁶ See *supra* notes 15–16 and accompanying text.

²⁰⁷ *Supra* note 14. The finding of no market power was supported by what counsel characterized as the ALJ's finding of "no impact on competition." Commission Transcript, *supra* note 91, at 12.

²⁰⁸ The "three contentions" CDA's counsel sought to establish at oral argument are quoted *supra* text at note 94.

²⁰⁹ CDA Commission Brief, *supra* note 87, at 3, 5, 7, 8–10, 12, 13, 14–16, 18–25, 28–34.

²¹⁰ *Id.* at i. Subheadings include "CDA's Activities Cannot Be 'Inherently Suspect' Because CDA Does Not Possess And Cannot Exercise Market Power," "The ALJ's Finding That CDA Lacks Market Power Refutes The Complaint's Anticompetitive Theory," "The ALJ's Citation of Mass. Board . . . Is Inapposite Because Market Power Was Present in Mass. Board," and "... The Commission Should State Explicitly That There Is a Market Power Screen."

testified") four different times,²¹¹ and quoted or paraphrased one of them an additional fifteen times.²¹² CDA's reply brief continued the overwhelming emphasis on the claimed lack of market power. Ten out of the fourteen headings in the Reply Brief relate to market power.²¹³ CDA claimed that Complaint Counsel had failed to call an economist expert and was asking the Commission to relieve them of the consequences of that decision.²¹⁴ Also featured again were Judge Parker's purported findings of no competitive effect, which were featured as blocked quotations twice²¹⁵ and quoted or paraphrased an additional five times.²¹⁶

²¹¹ *Id.* at 8–9 ("Based on the testimony of CDA's economic expert, Dr. Robert Knox, Judge Parker made the following findings of fact: • '[T]hat CDA's enforcement of its Code of Ethics with respect to advertising has *no negative impact on competition*. . . .") (emphasis added by CDA's counsel) (footnote appended to "Knox" notes that "The economic testimony of Dr. Knox is un rebutted."); 14–15 ("Judge Parker made the following findings of fact: • '[t]hat CDA's enforcement of its Code of Ethics with respect to advertising has *no negative impact on competition*. . . .") (emphasis added by CDA's counsel); 27; 33–34.

²¹² *Id.* at 5, 7, 10, 12 (twice), 19, 21, 24 n.6, 27, 28, 35 (three times); 53, 83.

²¹³ CDA Commission Reply Brief, *supra* note 90, at i–ii.

²¹⁴ *Id.* at 6:

At trial, Complaint Counsel elected not to call an economist to offer expert testimony concerning whether and to what extent CDA possessed market power, entry barriers, or the effects, if any, of CDA's activities in a properly-defined market. Complaint Counsel could have called the economist they designated as their expert prior to trial, Dr. John E. Kwoka, if they believed his testimony would support their anticompetitive theory. Significantly, Complaint Counsel refused to present Dr. Kwoka for a deposition and withdrew Dr. Kwoka from their witness list at trial. That was Complaint Counsel's prerogative.

²¹⁵ *Id.* at 15 (Finding 322), 26 (Findings 322 & 326).

²¹⁶ *Id.* at 6, 19, 22, 28, 31. CDA's counsel justified its misquotation of Judge Parker's reporting of testimony (by the omitting of the words "Professor Knox testified") as follows (quoted in its entirety, with emphasis in the original):

Realizing that Judge Parker's Findings of Fact with respect to the un rebutted economic evidence devastate their case, Complaint Counsel attempt to dismiss these findings as merely recounting the testimony of CDA's economic expert. (CAB at 64 n.50.) Apparently, Complaint Counsel take the disingenuous position that Judge Parker's Findings of Fact are irrelevant and superfluous padding mysteriously appended to the Initial Decision for no useful purpose. Of course, it would serve no purpose to recount the testimony of a particular witness in a Finding of Fact except to *find* that that testimony constituted a *fact*. Moreover, it is clear that Judge Parker did not merely restate testimony in his Findings Fact that he considered unsupported or irrelevant. Judge Parker's Findings of Fact with respect to the testimony of Dr. Knox are based on findings proposed by CDA. (*Compare* F. 322–327 with RPF 288–294, 297–298, 300–308.) As the Initial Decision explains on its first page:

This decision is based on the transcript of the testimony, the exhibits which I have received in evidence, and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrel-

(b) In the Ninth Circuit

In the Ninth Circuit, CDA attacked the Commission for what CDA claimed was its extension of the per se rule and for its failure to apply the full-blown rule of reason.²¹⁷ CDA summarized its argument as follows:

The practices challenged by the Commission must be analyzed under the traditional rule of reason analysis. The elements of a rule of reason analysis, as recently set forth in *American Ad Management*, 1996 U.S.App.LEXIS at *18-25, require a definition of the relevant product and geographic markets and an evaluation of the challenged practices' effect on competition in those markets. *Id.* at 24-25. The Commission made no effort to define the relevant market. More importantly, the ALJ explicitly found that CDA's challenged practices have "no impact on competition in any market in the State of California, particularly with respect to price and output." ER14, # 326. The FTC staff presented no economic testimony at trial and thus, there is a marked absence of any expert or other testimony sustaining the Commission's theory.²¹⁸

CDA's argument with respect to non-discount advertising was especially simple: Once the Commission conceded that this was not a "naked restraint on price or output," it was required (according to CDA) to proceed with a full-blown rule of reason.²¹⁹

Once again, CDA repeatedly pointed to what it claimed was its lack of market power.²²⁰ CDA strongly criticized Complaint Counsel for offering no economics expert at trial.²²¹ Also, once again, CDA relied heavily on its tactic of omitting the words "Professor Knox testified" in order to

evant.

(ID at 1) (emphasis supplied). When one compares Judge Parker's Findings of Fact with CDA's proposed findings it is clear that, with respect to the testimony of Dr. Knox, Judge Parker adopted certain of CDA's proposed findings verbatim, that he adopted the substance of others, and that he declined to adopt other findings or portions thereof.

Id. at 31-32.

²¹⁷ CDA's brief's first three headings said that (1) use of the per se rule was error, (2) "applying a 'quick-look' analysis" was error, and (3) CDA did not violate "the traditional rule of reason" because its activities "have no anticompetitive effect" and "there can be no antitrust violation in view of low entry barriers." CDA Ninth Circuit Brief, *supra* note 7.

²¹⁸ *Id.* at 20. See also Reply Brief of Petitioner California Dental Ass'n in the United States Court of Appeals for the Ninth Circuit at 13 (No. 96-70409) [hereinafter CDA Ninth Circuit Reply Brief] ("Under the traditional rule of reason analysis, the FTC must define a relevant market, properly analyze entry conditions in the market, and establish an adverse effect on competition.").

²¹⁹ CDA Ninth Circuit Brief, *supra* note 7, at 44.

²²⁰ *Id.* at 2, 6, 7-8, 10, 20, 24, 45, 50-54.

²²¹ *Id.* at 20 (summary of argument); 48 ("Prior to trial, the FTC withdrew their only economist designated as a witness from their witness list and the FTC presented no economic testimony at trial."); CDA Ninth Circuit Reply Brief, *supra* note 218, at 5 n.2 ("the FTC failed to call any economist as a witness").

transform an ALJ report of testimony into an independent ALJ finding of no effect on competition.²²² In its reply brief, CDA reemphasized its claimed lack of market power, attacked the use of the per se rule,²²³ attacked the Commission for "Applying A 'Quick-Look' Analysis to CDA's Ethical Provisions Concerning Advertising,"²²⁴ and criticized the Commission for failing formally to define a relevant market²²⁵ and finding a violation when entry barriers are low.²²⁶

(c) In the Supreme Court

In the Supreme Court, CDA was not shy about what it sought on the antitrust part of the case: the Full Monty. The relevant section of its brief is captioned, "CDA's Conduct Should Have Been Judged Under A Full Rule of Reason Analysis."²²⁷ CDA argued that a "full rule of reason analysis is necessary in most instances," including this one.²²⁸ It continued to alter quotations in order to claim that the ALJ had found that CDA's activities had no negative effect.²²⁹ CDA concluded where it began: "Advertising requirements promulgated by professional associations directed at potentially misleading and unverifiable claims, such as those at issue here, should be prohibited only upon a showing of anticompetitive effect after a full rule of reason analysis."²³⁰ In its reply brief, too, CDA again called for application of the "full blown rule of reason."²³¹

²²² Altered findings 322 and 326 were featured as centered quotations once each, CDA Ninth Circuit Brief, *supra* note 7, at 6-7, and were quoted or paraphrased at least an additional nine times, *id.* at 2, 8, 18, 20, 37, 39, 46, 51 & 55. Finding 322 also was once featured as a centered quotation with the words "Professor Knox testified" retained. *Id.* at 47. In its Reply Brief, CDA again featured altered but otherwise full quotations, CDA Ninth Circuit Reply Brief, *supra* note 218, at 2-3, and quoted or paraphrased this language twice, *id.* at 14 & 23. As it had before the Commission, CDA defended its misquoting of the ALJ's reportorial findings concerning expert witness Knox by arguing that "[t]he ALJ clearly adopted that portion of Professor Knox's testimony contained in his findings." *Id.* at 19.

²²³ *Id.* at 8-13.

²²⁴ *Id.* at 13-17.

²²⁵ *Id.* at 18-21.

²²⁶ *Id.* at 21-22.

²²⁷ CDA Supreme Court Brief, *supra* note 104, at iii.

²²⁸ *Id.* at 32.

²²⁹ One or both of the Findings of Fact 322 and 326 were quoted in full (except for the mention that the thoughts were Professor Knox's) twice, *id.* at 7 & 27, and were quoted or paraphrased an additional eight times, *see id.* at 2 (the antitrust issue in the case is said to be whether "a prohibition against false and misleading advertising, which has been affirmatively found to have no impact on competition, [can] nonetheless violate the antitrust laws"), *id.* at 13, 15 (twice), 41-44.

²³⁰ *Id.* at 41.

²³¹ CDA Supreme Court Reply Brief, *supra* note 64, at Heading II.B.

2. *The Supreme Court's Response to CDA's Plea to Require Formal Proof of Market Power*

The market power issue was starkly posed at the very end of the Supreme Court oral argument when Justice Scalia observed, "I don't understand how there can be an anti-competitive effect when there is no market power."²³² CDA's position was that anticompetitive effects cannot occur without market power, and, accordingly, the complaint should be dismissed. CDA asked the Supreme Court to agree that the Commission and the Ninth Circuit had erred by failing to engage in a full-blown rule of reason, including detailed, formal measurement of market power.²³³

This the Supreme Court refused to do. The Court directed scrutiny not to market power, but to the particular practices in which CDA had engaged. The Court reviewed a series of reasons why professional advertising raises special issues, and criticized the Ninth Circuit for giving insufficient attention to CDA's "plausible" justifications.²³⁴

The Court conspicuously did *not* call for examination of market power. The Court cited with apparent approval two "quick look" opinions that had eschewed formal measurement of market power.²³⁵ (One of those opinions had been strongly attacked in an amicus brief as having "remove[d] the calculus of anticompetitive effects from the rule of reason."²³⁶) Nowhere is the Commission faulted for any failure formally to define product and geographic markets, to measure entry barriers, to calculate market shares, and the like. To the contrary, the Court specifically rejected that approach:

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "requir[e] some competitive justification," it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason"

²³² Justice Scalia was echoing a theme associated with, among others, Judge Easterbrook. See *supra* note 128.

²³³ See *supra* Part IV.C.1.

²³⁴ See *supra* Part III.B.

²³⁵ 119 S. Ct. at 1613 (citing *Law v. NCAA* and *Chicago Professional Sports*, which are discussed *supra* text at notes 170-76).

²³⁶ NCAA Amicus Brief, *supra* note 157, at 12.

tend to make them appear. . . . "There is always something of a sliding scale in appraising reasonableness" ²³⁷

More generally, the Court did not employ the language that is associated with an economics-oriented emphasis on the primacy of formal proof of market power.²³⁸ In its summary of *Indiana Federation of Dentists*, the Court described it as a case in which conspirators agreed "to withhold a particular desired service"²³⁹—not, as sometimes happens, as a case in which there had been proof of actual harm to competition. The Court's non-economics-oriented approach is typified by its declaration that "false or misleading advertising has an anticompetitive effect, as that term is customarily used."²⁴⁰ The Court said that this proposition "has long been established," citing *FTC v. Algoma Lumber Co.*, a venerable FTC false advertising case that the Court hadn't cited in more than thirty years.²⁴¹ *Algoma Lumber*, which was decided at a time when the FTC Act prohibited only "unfair methods of competition,"²⁴² held that it was illegal to mislabel products in substantial part because "[d]ealers and manufacturers are prejudiced when order that would have come to them if the lumber [the product at issue] had been rightly named."²⁴³ The Court's assertion that false advertising is anticompetitive was notably devoid of any qualifications about prices or output, let alone market power. Indeed, *Algoma Lumber* expressed concern about mislabeling prejudicing affected competitors even if consumers receive lower prices: "Fair competition is not attained by balancing a gain in money against a misrepresentation of

²³⁷ 119 S. Ct. at 1617 (citation to *NCAA* omitted) (quoting PHILLIP E. AREEDA, ANTITRUST LAW § 1507, at 402 (1986)).

²³⁸ The one point on which the Court took a more economics-oriented approach concerned non-discount advertising. In response to the Ninth Circuit's suggestion that preventing the promoting of patient comfort may affect output because fewer consumers would obtain non-emergency care, the Court observed that "restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices." 119 S. Ct. at 1616.

²³⁹ *Id.* at 1612; see also *id.* at 1613 (same).

²⁴⁰ *Id.* at 1613 n.9; see also *id.* at 1615 (reference to possibility that any "costs to competition" from CDA's rules might be "outweighed by gains to consumer information (and hence competition)").

²⁴¹ *Id.* at 1613 n.9 (citing, with a "cf.," *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79–80 (1934)); cf. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 380 (1965) (most recent case previously to cite *Algoma Lumber*).

²⁴² In response to the Court's decision in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), that a deceptive practice was not illegal unless it had the requisite connection with competition, Congress overruled the case through the 1938 Wheeler-Lea Amendments, Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, which extended the FTC Act to cover "unfair or deceptive acts or practices."

²⁴³ 291 U.S. at 78.

the thing supplied.”²⁴⁴ As it had in its decision earlier in the same term, *NYNEX Corp. v. Discon, Inc.*,²⁴⁵ the Court comfortably relied upon an opinion from an earlier, less economically sophisticated era.

V. IN PRAISE OF THE SLIDING SCALE

CDA is both a call for use of a “sliding scale” of antitrust analysis and a striking example of why such an approach makes sense. The *CDA* litigation is replete with examples of the problems created by clever formulas. It is an object lesson in the law of unintended consequences as it might apply to well-meant efforts to structure analyses.

A. “INHERENTLY SUSPECT”?

The potential problem created by *Mass. Board*²⁴⁶ is obvious in the ALJ’s Initial Decision. Any candid observer would have to admit that the ALJ did too much applying of the rubric of *Mass. Board* and too little critical thinking. When he had declared that CDA had no market power, he should have rethought his conclusion, not simply ended his opinion. Simply as a matter of judicial craftsmanship and engagement in the issues, the opinion is disappointing. It is odd, at best, to make findings about an issue (market power) and then to conclude that its resolution is irrelevant. If ALJs are going to condemn a practice they find lawful under the rule of reason, they should be careful about it. It is one thing to proceed to condemn a restraint when one is uncertain about market power; it is quite another to condemn a restraint when one has concluded that market power is absent.

The problem was not just with the ALJ. Both sides struggled to show why CDA’s conduct is or is not within the *Mass. Board* pigeonhole of “inherently suspect,” whereas they might better have spent the time and space analyzing likely competitive effect. Of the CDA brief’s pages devoted to the principal substantive issue, a majority were addressed to the ALJ’s application of *Mass. Board*.²⁴⁷ Complaint Counsel discussed empirical evidence about the kinds of advertisements California dentists ran only in response to Commission questioning.²⁴⁸ Most of his argument

²⁴⁴ *Id.*

²⁴⁵ 119 S. Ct. 493, 497 (1998) (Breyer, J.) (unanimous opinion that discusses without reservation the application of the per se rule in *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941), and *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (which the Court read as a horizontal boycott case)).

²⁴⁶ See *supra* text accompanying note 158.

²⁴⁷ CDA Commission Brief, *supra* note 87, at ii–iii (“The ALJ’s Application of *Mass. Board* is Erroneous;” “CDA’s Activities Are Not ‘Inherently Suspect.’”).

²⁴⁸ See *supra* note 91.

responded to CDA's arguments by attempting to show why the ALJ's finding of no market power was both wrong and non-dispositive.

With hindsight, of course, we know that time spent specifically on *Mass. Board* may not have been time spent to best advantage. Even had the Commission fully applied *Mass. Board*, however, it likely would have profited from the parties' spending less time on the applicability of that structure and more time on the underlying issues. One problem with elegant structures erected by smart men and women is that they are often replaced by other structures erected by their equally smart successors.

B. "NAKED RESTRAINTS"?

As discussed above, the search for a middle category of analysis is often associated with *NCAA*. In particular, the Court in *NCAA* said it was applying the rule of reason but that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."²⁴⁹ Given *NCAA*'s association with the "quick look," this has led to the suggestion that the "quick look" is available only for "naked restraints," with all other restraints being analyzed under the full-blown rule of reason. Of course parties to what is truly a naked restraint on price and output should be subjected to the per se rule, because the arrangement would "always or almost always tend to restrict competition and reduce output."²⁵⁰ The only way to read *NCAA* sensibly is to presume that the Court actually was referring to arrangements that are perilously close to ones that are per se illegal.

The problem with the idea that non-naked restraints must be subject to the full-blown rule of reason was nicely illustrated in the *CDA* litigation. The Commission ruled that for CDA's restraints on non-price advertising it could "say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'"²⁵¹ The Commission concluded that accordingly it would be cautious and apply the rule of reason, rather than the per se rule. CDA cried "gotcha!" and argued to the Ninth Circuit that the Commission had "conceded that CDA's activities concerning nonprice advertising do not constitute the sort of 'naked restraint on price or output that would justify a 'quick look.' Under the

²⁴⁹ 468 U.S. at 110.

²⁵⁰ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979).

²⁵¹ 121 F.T.C. at 307–08 (quoting *BMI*, 441 U.S. at 19–20).

circumstances, the Commission erred as a matter of law in applying a 'quick look' to CDA's activities."²⁵²

This kind of argument does antitrust no good. Although one can decipher what the Court *meant* in *NCAA*, it is not wholly unreasonable for litigants to point to what the Court *said*. With all respect to the Court, the idea that a naked restraint could be subject both to the per se rule and to some other form of analysis never made good sense and has caused mischief.

C. "QUICK LOOK"?

The term "quick look" is itself unfortunate. It is both a term of art and an ordinary phrase, which is always problematic. Even as a term of art it has multiple uses. As discussed above, it has been used to refer to a court's pausing to reflect before applying the per se rule (sort of a "thoughtful per se rule"). This was the sense in which Judge Posner used the term in *Vogel* and *General Leaseways*.²⁵³ It has also been used as a term of art to refer to a situation in which a court is comfortable concluding that a restraint is anticompetitive without engaging in a full-scale rule of reason review. This was the sense in which the term was used, for instance, in *Law v. NCAA*.²⁵⁴ With either meaning, the point of the "quick look" is that a conclusion can be reached without engaging in a merger-type analysis—the Full Monty. Since it is comprised of ordinary words, the term "quick look" also can be used with an ordinary-language meaning, i.e., briefly considering something.

Hindsight, however, makes clear that the Commission never should have used the phrase "quick look." In context, it is apparent that the Commission must have meant merely the term-of-art signal that it was proceeding without full-blown, merger-type, precise measurement of localized market shares. After all, the Commission was proceeding after trial, with the benefit of a lengthy Initial Decision, after full oral argument and briefing, and with substantial opinions.²⁵⁵ Unfortunately for the

²⁵² CDA Ninth Circuit Brief, *supra* note 7, at 44 (citation to *American Ad Management* omitted).

²⁵³ *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7th Cir. 1984); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984); *see supra* text at notes 167–69.

²⁵⁴ *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (discussed *supra* text accompanying notes 175–76).

²⁵⁵ The Supreme Court noted approvingly that Justice Breyer had written 14 pages compared with the Ninth Circuit's 8. 119 S. Ct. at 1617. This must have been an apples and oranges comparison, since the Ninth Circuit used 8 pages of F.3d, whereas Justice Breyer used only just over 6 pages of the Supreme Court Reporter (Justice Souter used 10½). But Judge Parker, Chairman Pitofsky, and dissenting Commissioner Azcuenaga

Commission, its opinion occasionally may seem to use “quick look” to refer to an overall abbreviating of the rule of reason and various parts thereof.²⁵⁶ In context, it is clear that the Commission meant merely that any rule of reason analysis should be of appropriate length,²⁵⁷ but the Commission unfortunately described its analysis as “simple and short,”²⁵⁸ which was neither accurate nor helpful on appeal.

The Ninth Circuit appears to have understood that the Commission used the phrase “quick look” as a term of art that describes rule of reason treatment without formal merger-type market power analysis.²⁵⁹ When it examined the evidence supporting the Commission’s decisions on the four key issues (agreement, intent, effect, and market power), the Ninth Circuit referred to the “quick look” only in connection with

each wrote enough pages in the FTC Reports (79, 50, and 29½, respectively) to win any quantity-based contest, even after one adjusts for the fewer words on a page of the *FTC Reports*.

²⁵⁶ In an introductory overview of antitrust analysis, the Commission observed that the rule of reason “enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a ‘quick look’ review.” 121 F.T.C. at 298 (citing *Indiana Federation of Dentists* and *NCAA*). To the same effect, the Commission added that the full-blown rule of reason review “can take place expeditiously under a ‘quick look’ approach.” *Id.* at 299. And in its conclusion, the Commission observed that CDA’s non-price restraints “are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail.” *Id.* at 333.

²⁵⁷ Immediately before it began its detailed scrutiny of the conduct at issue and its context, the Commission explained what it would be doing:

The Supreme Court has made clear that the rule of reason contemplates a flexible inquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA’s advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

121 F.T.C. at 308 (citation to *NCAA* omitted). Although the alliterative “simple and short” may suggest inaccurately that the Commission did not devote substantial time and thought to the matter, the discussion of market power makes clear that the Commission was really just explaining why it found unavailing CDA’s claim that the Commission shouldn’t proceed without requiring Complaint Counsel to retain a testifying economist who could help define scores of localized geographic markets.

²⁵⁸ *Id.* at 308.

²⁵⁹ 128 F.3d at 727 (citation omitted):

In this case, the FTC applied an abbreviated, or “quick look,” rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. *See NCAA* (“The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.”). It allows the condemnation of a “naked restraint” on price or output without an “elaborate industry analysis.”

its discussion of market power.²⁶⁰ Unfortunately, the court also used the phrase "quick look" imprecisely. It wrote that CDA's "possible justification" of preventing false and misleading price advertising does not "require more than a quick look" because CDA prohibited all across-the-board discounts and "the record provides no evidence that the [CDA] rule has in fact led to increased disclosure and transparency of dental pricing."²⁶¹ In context, the court must have meant that the justification CDA had presented to it was obviously deficient, but by succumbing to the lure of the phrase "quick look," the court left itself open to criticism by CDA, its allies, and eventually the Supreme Court majority. By giving the impression that the Ninth Circuit or the Commission had been casual in its consideration of CDA's claimed justification, the Ninth Circuit left itself open to attack.

Counsel opposed to the Commission inevitably excoriated the Commission and the Ninth Circuit for proceeding with unseemly haste, and the Supreme Court seems to have been persuaded that the analysis below did not just scrimp on merger-type market analysis but omitted minimally necessary thought and consideration. Thus, the Court wrote that "advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment."²⁶² The Court criticized what it called "the indulgently abbreviated review to which the Commission's order was treated."²⁶³ Giving the phrase "quick look" its ordinary English-language meaning, the Court favorably compared Justice Breyer's dissent to the court of appeals's opinion, and, even counting pages (14 to 8), observed that his "treatment of the antitrust issues here is no 'quick look.' Linger is more like it . . ."²⁶⁴ Indeed, the Court's final conclusion is that "a less quick look was required."²⁶⁵

This free-form mixing of a phrase's ordinary meaning and the specialized sense in which it was used is a reminder of the mischief that can come when words or phrases have multiple meanings. The Commission may have focused on arguments CDA was presenting to it, and not the

²⁶⁰ *Id.* at 729-30 ("Although the Commission did not engage in a detailed analysis of market power, . . . we conclude that they [its conclusions] suffice under the quick look rule of reason in light of the nature of the restraints involved. . . . Given the facially anticompetitive nature of both the price and nonprice advertising restrictions, the evidence of the CDA's large market share and influence justifies finding a violation under the quick look rule of reason.").

²⁶¹ *Id.* at 728.

²⁶² 119 S. Ct. at 1614.

²⁶³ *Id.* at 1617.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1618.

arguments that would eventually appeal to the Court; this was not a matter of haste, but rather simply litigation realities. Although Commissioner Azcuenaga rather strenuously attacked the Commission's fact finding, the law is clear that the majority's fact finding is owed deference, and no appellate judge showed an interest in questioning the evidence supporting the Commission's findings. But because the Commission proceeded with what it described as a "quick look," the Court seemed willing to assume without much evidence that the Commission and the Ninth Circuit had acted too quickly.

D. "ON ITS FACE"?

Two seemingly unremarkable propositions were juxtaposed in *CDA*, with the result that the analysis was unnecessarily confused. The first is the concept of the facial unreasonableness of a practice. From time to time, courts direct attention to what agreements accomplish "on their face." *Professional Engineers* ruled that "[o]n its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act."²⁶⁶ *Broadcast Music* directed our attention, when deciding whether to apply the per se rule, to whether a restraint "facially appears to be one that would always or almost always tend to restrict competition and decrease output."²⁶⁷ The Ninth Circuit wrote that the FTC had applied a "quick look" rule of reason "designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry."²⁶⁸ Since agreements that may be plainly anticompetitive may be written or unwritten, "facially" must be meant figuratively to refer to the plain sense of an arrangement.²⁶⁹

The second proposition was that a document may be written one way and enforced another. The Ninth Circuit observed that "[o]n its face, the [CDA] Code only extends to false and misleading advertisements."²⁷⁰

²⁶⁶ 435 U.S. at 693.

²⁶⁷ 441 U.S. at 19–20. The Commission wrote, about non-price restraints, that it "cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that 'the practice facially appears . . .'" 121 F.T.C. at 307.

²⁶⁸ 128 F.3d at 727 (citing *NCAA*).

²⁶⁹ Cf. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 236 (1987) ("Face," in "on its face," "refers to the inscribed side of a document. It means 'in the words of, in the plain sense of' . . . The phrase is sometimes used figuratively of things other than documents. E.g., 'A libel is harmful *on its face*.'"). That antitrust "facial unreasonableness" does not really refer to the words of a document was understood by Professor Areeda:

The inelegant phrase, reminiscent of facially unconstitutional statutes, may seem to focus attention on the words on the face of an agreement. Rather, [*United States v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980)] meant that judgments

It agreed with the Commission, however, that "through its [CDA's] pattern of enforcement," which included advisory opinions and guidelines, "CDA went beyond the literal language of its rules to prohibit ads that were in fact true and nondeceptive."²⁷¹ The Commission had said the same thing without using the words "on its face."²⁷² Earlier in its opinion the Ninth Circuit wrote another version of the same observation, as part of the discussion of its decision not to apply the per se rule: "Unlike the situation in *AMA* and *Mass. Board*, the CDA's policies do not, on their face, ban truthful, nondeceptive ads. The allegation is that the rules have been enforced in a way that restricts truthful advertising."²⁷³

In this litigation, CDA's counsel blurred the two propositions. Citing the Ninth Circuit's observation about CDA's policies "on their face" not banning truthful, nondeceptive advertising, it argued that "CDA's advertising guidelines are procompetitive on their face."²⁷⁴ It also argued that "the lower courts have held that the abbreviated rule of reason is appropriate only where conduct is 'on its face' a restraint on price or output for which there is no procompetitive justification."²⁷⁵ It warned about the risk of expanding the "quick look" to "conduct that is not facially anticompetitive."²⁷⁶

The Supreme Court, as part of its explanation of why the majority disagreed with the dissent, wrote that CDA's advertising restrictions "are, at least on their face, designed to avoid false or deceptive advertising."²⁷⁷ What is unclear is the sense in which the phrase "on their face" is used. If the Court meant "as written, without worrying about the reality," one wonders why that should be the touchstone. If the Court meant "looking to the plain sense of the arrangement," the Court was finding facts

can sometimes be made on the basis of the parties' arguments in the light of what the judges know about the economy and in the light of such modes information as may be available at the beginning of the lawsuit.

7 AREEDA, *supra* note 173, at 405.

²⁷⁰ 128 F.3d at 729.

²⁷¹ *Id.* at 729 (footnote omitted).

²⁷² 121 F.T.C. at 301 ("Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts."); *cf. id.* at 340, 342, 347, 352 (Azcuena, Comm'r, dissenting) (CDA's code is unobjectionable "on its face").

²⁷³ 128 F.3d at 727.

²⁷⁴ CDA Supreme Court Brief, *supra* note 104, at 33.

²⁷⁵ *Id.* at 32 (quoting from three opinions that discuss limiting the "quick look" but that do not refer to examining restraints "on their face").

²⁷⁶ *Id.* at 45.

²⁷⁷ 119 S. Ct. at 1613.

inconsistent with those found by the Commission, without making clear why it was doing so. Either way, it was unhelpful to have the Ninth Circuit use "on their face" in two different ways.

E. "PLAUSIBLE EFFICIENCIES"?

In *CDA* the Supreme Court was invited to hold that whenever a defendant can point to "facially plausible" efficiencies, scrutiny of its actions must proceed under the full-blown rule of reason—the Full Monty.²⁷⁸ The Court refrained from doing so. The issue is sufficiently important that it deserves attention, both for what the Court did and for why the invitation deserved to go unaccepted.

Consider what the Court was asked to do. It was asked to let what was admittedly a "modest showing"²⁷⁹ have major consequences. Mere assertion of a "plausible" efficiency justification would trigger a review process in which the outcome was statistically extremely likely to be favorable to defendant. The low standard posed by "plausible" is made clear by contrasting "plausible" with what would be a slightly less indulgent standard, "credible": "[P]lausible applies to that which at first glance appears to be true, reasonable, valid, etc. but which may or may not be so. . . . [a *plausible* argument]; **credible** is used of that which is believable because it is supported by evidence, sound logic, etc. [a *credible* account]."²⁸⁰ "Plausible" is derived from the Latin for "deserving applause;" "credible" from the Latin for "to believe."²⁸¹ Yet the Court was asked to let the assertion of any "plausible" justification trigger full-blown rule of reason review.

The Court did not accept the invitation. Nowhere did it suggest that plausibility (which it does repeatedly mention²⁸²) should result in the merger-type measurement of market power. Rather than shifting attention from effects to power, it called for increased attention to effects. What was needed was further examination of "the theoretical basis for the anticompetitive effects" and consideration of "whether the effects actually are anticompetitive."²⁸³ Nor is there reason to believe the Court meant by this indirectly to invite attention to market power.²⁸⁴

²⁷⁸ See *supra* Part IV.C.1(c).

²⁷⁹ NCAA Amicus Brief, *supra* note 157, at 16.

²⁸⁰ WEBSTER'S NEW WORLD DICTIONARY 1091 (2d College Ed. 1982).

²⁸¹ THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993).

²⁸² See *supra* notes 192–94.

²⁸³ 119 S. Ct. at 1615 n.12.

²⁸⁴ See *supra* Part IV.C.2.

By declining to let mere plausibility make such a major difference, the Court fit comfortably with precedent. The lower court cases associated with the "quick look" considered far more than merely whether proffered justifications seem proper at first glance, although they "may or may not be."²⁸⁵ Indeed, Judges Posner's or Easterbrook's "quick looks" might well pass for another judge's "sedulous" ones.

The Supreme Court understood that the essential need is a sense of proportion. At issue here were three factors: (1) the strength of Complaint Counsel's showing that the restraints raised serious issues; (2) the strength of CDA's showing of justifications; and (3) the consequences of concluding that each of those showings was sufficient. For instance, the Solicitor General's amicus brief in *NCAA* argued that a "plausible efficiency justification" should prevent application of the *per se* rule.²⁸⁶ But the SG continued by observing that "[i]t may be that further examination will show that the proffered efficiency justification should be rejected; in that event, the conduct can still be condemned as unreasonable without completing a 'full' rule of reason analysis that includes market definition and market power determinations."²⁸⁷ Similarly, Professor Areeda, who was cited by a CDA amicus brief for suggesting that defendants need show mere plausibility,²⁸⁸ called for an early "quick look" at a restraint's justification to see whether, usually based on the arguments alone, the justification is "legitimate in principle and capable of being proved satisfactorily."²⁸⁹ This is a higher test than mere plausibility. More significant, a defendant who carries the day at this stage does not win recourse to the kind of full-blown rule of reason the *NCAA* and CDA were advocating. Rather, it has recourse to what Professor Areeda contemplated as a rule of reason, which can feature presumptions about restraints' severity, attention to less restrictive alternatives, and the like—the sliding scale, not the Full Monty.²⁹⁰

²⁸⁵ See *supra* Part IV.A.3.

²⁸⁶ *Supra* text at note 157.

²⁸⁷ Amicus Brief at 10; see also *id.* at 12–13 ("Where the practice at issue is shown to pose high anticompetitive risks because, on its face, it restricts output or restrains price competition, a court can and should address the above efficiency questions without conducting a 'full' rule of reason analysis of market definition and market power. If at any point it becomes clear that the collaborators have no viable, significant efficiency justification, a facially suspect restraint can be condemned without further inquiry.") (citation omitted).

²⁸⁸ *NCAA* Amicus Brief, *supra* note 157, at 16.

²⁸⁹ 7 AREEDA, *supra* note 173, at 429.

²⁹⁰ It has been suggested that the antitrust rule of reason should mimic employment discrimination cases involving employee discharges: after the plaintiff establishes a *prima facie* case of discrimination, an employer must articulate a "legitimate, nondiscriminatory reason for its actions." This articulation shifts the burden back to the plaintiff to show

F. THE PROBLEM WITH MERE PLAUSIBILITY: A LESSON

Ironically, CDA itself serves as a good illustration of the problem with letting mere plausibility trigger the full-blown rule of reason. Recall how easily the Supreme Court majority ruled that CDA had offered "plausible" justifications for its restrictions: that CDA's rules stimulated advertising of particular discounts so effectively that the gain in consumer information outweighed the loss through prohibition of generalized claims of discounts, and that CDA's ban on quality claims was the only way to prevent false and deceptive advertising.²⁹¹ Yet this discussion of plausibility was occurring, not at the start of a case, but at the end of six years of active litigation.

that the articulated reasons are mere pretext. Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 280 & n.116 (citing BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 597-603 (2d ed. 1983)), summarized and relied upon, NCAA Amicus Brief, *supra* note 157, at 16 n.6.

The comparison to employment discrimination law actually serves to caution against giving undue weight to a merely plausible antitrust justification. In employee discharge discrimination cases, the plaintiff's initial burden is "not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff simply shows that he or she is in a protected class, was discharged from a job for which he or she was qualified, and was replaced by a person outside the protected group. 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 847 (3d ed. 1996). The defendant's burden is even lighter. Indeed, "an employer can almost always articulate a valid, objective reason for the discharge." SCHLEI & GROSSMAN, 2D ED., *supra*, at 597; see also SCHLEI & GROSSMAN, 3D ED., *supra*, at 853 ("Employers normally have little difficulty articulating a legitimate, nondiscriminatory reason . . ."). This initial skirmishing merely sets the stage for what disparate treatment employment discrimination is all about: disputing whether those articulated reasons are a pretext concealing discrimination. *Id.* at 853-57.

A different structure is used for disparate impact employment discrimination litigation. Here the plaintiff has the serious initial burden of showing that an employment policy or practice has a significantly disproportionate adverse impact on a protected class. *Id.* at 89. The defendant then has correspondingly serious burdens of production and persuasion to show that the policy or practice is justified as "job-related for the position in question and consistent with business necessity." *Id.* at 87, 106-110 (quoting statute). Here, mere plausibility will not do; this is not just stage setting. The essence of disparate impact employment discrimination litigation is this dispute between proof of effect and proof of justification. See generally Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993). (Even if a defendant satisfies those burdens, a disparate-impact plaintiff may still prevail by proving the existence of a satisfactory alternative policy or practice without a discriminatory impact that the employer refuses to adopt. SCHLEI & GROSSMAN, 3D ED. at 111-13.)

If employment discrimination litigation should provide a model for antitrust, one has to choose which model. The plaintiff and defendant each could have light initial burdens, which would leave the heavy lifting for a later stage. Alternatively, the plaintiff and defendant each could be held to a more demanding standard. But one cannot reasonably demand a substantial showing from the plaintiff, something trivial from the defendant, and then something overwhelming from the plaintiff.

²⁹¹ See *supra* Part III.

When a case has been litigated as long as this one, when a defendant has made as many different arguments as CDA had here, and when even in a court of appeals, when there is record evidence about actual practices, a defendant does not show how that evidence supports a position (here, on the net effect of its restrictions), it is not unreasonable for a court of appeals to note that the record appears to provide no evidence to support a theory. When the record contains many advertisements, and the defendant has discussed them without claiming that any make specific, detailed pricing claims, the odds are strong that the point was forgone because the advertisements do not make such claims. And yet CDA won in the Supreme Court, in part, by persuading the Court that its "net-increased-disclosure" argument was "plausible."²⁹² In terms of future developments in the law, this outcome serves principally to caution against making mere plausibility too outcome-determinative.²⁹³

²⁹² In the Court's defense, the Solicitor General (with the FTC) should have pointed out the novelty of the justifications on which CDA was relying. For some reason (one can speculate about the inevitable challenges when an agency and the SG's office jointly prepare a brief), the SG did not adequately make this point. With respect to quality claims, he merely pointed to a First Amendment case's teaching about the importance of making government regulators distinguish the truthful from the false, and said that this "admonition is even more apt in the context of industry self-regulation." SG Brief, *supra* note 64, at 42 (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988)). With respect to the "net increased advertising of discounts" argument, the SG wrote as follows:

Petitioner nonetheless speculates (Br. 36) that its member dentists, even if effectively (and reasonably) precluded from advertising across-the-board discounts by its restrictions, should be able to comply with a requirement that advertised discounts on individual services be accompanied by a litany of disclosures. The Commission, however, exercising its expertise in the effects of advertising claims, found that "the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive." Pet. App. 85a. It also noted that petitioner's restrictions went far beyond any restriction that would be necessary to prevent dentists from engaging in "chicanery" such as selectively inflating the price from which the discount is computed. *Ibid.*

Id. at n.28. Ironically, CDA complained about the Commission's failure to claim *Chevron* deference to its assertion of jurisdiction until its Supreme Court merits brief, and wrote that the Court was "entitled to ignore the Commission's belated embrace of this argument." CDA Supreme Court Reply Brief, *supra* note 64, at 9. CDA cited *Schiro v. Farley*, 510 U.S. 222, 228–29 (1994), where the Court observed that it "ordinarily do[es] not review claims made for the first time in this Court." Indeed, the same month that the Court issued its CDA opinion it declined to address an argument raised for the first time in an opposition to certiorari. *I.N.S. v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1449 (1999) (contention that there were errors in translation).

²⁹³ Another source of caution is the confidence with which advocates in CDA pointed to *NCAA* and *IFD* as, for instance, "prime examples of the type of conduct that qualifies for 'quick look' review." NCAA Amicus Brief, *supra* note 157, at 8. The NCAA now states that in the *NCAA* case, "colleges pooled their sales of televised football games in a way that inevitably restricted output, and, by setting a single price scale for that restricted output, effectively fixed prices as well." *Id.* at 9. When the *NCAA* case was before the Court, however, that distinguished institution retained eminent counsel (Frank H. Easterbrook) who argued that the challenged restraints must be judged under the full-blown rule of

In *CDA* the Court found “plausible” arguments that had not been seriously explored through litigation below. Indeed, on remand, CDA has asked the Ninth Circuit for briefing on issues related to professional advertising because “[t]he parties did not address these issues in their briefs in this Court on the initial appeal”²⁹⁴ Since “plausibility” does not have outcome-determinative consequences, this is a result that wastes resources but is not a travesty. Had the Court ruled as requested, that the plausibility of these arguments meant that the full-blown rule of reason was required, the consequences would have been much more serious. A full-blown rule of reason would have required Complaint Counsel to pull out a map of California and begin dividing it into carefully drawn, individualized geographic markets—an assignment so daunting that they would have abandoned the effort untried. Because the Court merely called for a “less quick look,” Complaint Counsel and CDA are free to examine the record evidence anew and find support or lack thereof for the justifications the Court found “plausible.”

G. THE ROLES OF THE FTC, THE COURT OF APPEALS, AND THE SUPREME COURT

The *CDA* majority’s opinion is eerily quiet about the Commission and its opinion and findings. The last sentence is indicative of the Supreme Court’s intriguing focus only on the Ninth Circuit. “Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue”²⁹⁵—not because the Commission erred in the standard it applied, or the vigor of its scrutiny, but because the Ninth Circuit did. Earlier, the majority explained that Justice Breyer’s dissent “contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals’s review.” Justice Souter wrote that if the Ninth Circuit “engaged in a painstaking discussion in a league

reason because they improved quality and increased competition. Brief for the Petitioner, *NCAA*. Had mere “plausibility” been the test, *NCAA* never would have passed. Similarly, the American Dental Association argued in a *CDA* amicus brief that “[u]nlike the rules at issue in those cases [*NCAA* and *IFD*], the ethical canons of the CDA are supported by strong procompetitive justifications.” ADA Amicus Brief, *supra* note 195, at 19 n.9. When *IFD* was before the Court, however, that distinguished association argued that the Seventh Circuit had correctly upheld the challenged rules under the full-blown rule of reason. Brief Amicus Curiae of the American Dental Ass’n in Support of Respondent Indiana Federation of Dentists. The point is not that there is anything improper about an entity finding itself on the losing case and then attempting, in future litigation, to distinguish that case. The changing perspectives serve only as a reminder of how easily a “plausibility” test could be passed.

²⁹⁴ Motion of California Dental Association for A Briefing Schedule and for Oral Argument, No. 96-70409 (filed Oct. 22, 1999).

²⁹⁵ 119 S. Ct. at 1618.

with Justice Breyer's" and confronted the issue of verifiability, "its reasoning might have sufficed." But "[t]he obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance."²⁹⁶

One would have thought that the Court might have shown more interest in the Commission's decision. The *CDA* litigation has close parallels to *Indiana Federation of Dentists*, where the Court, reversing the Seventh Circuit, upheld the Commission's condemning of a dental association's restraints without engaging in a full-blown rule of reason inquiry. In *Indiana Federation of Dentists* the Court wrote at length about the Commission's opinion. Both of the *CDA* parties assumed that the Court would closely examine the Commission's opinion. The SG's brief is replete with references to the Commission's analysis and conclusions. The applicable heading of this section of the brief is captioned "The Commission Correctly Concluded . . . ," and its four subheadings each begin with "The Commission." *CDA*, too, regularly discussed (critically) what the Commission had done, often linking the Commission's alleged sins with those of the Ninth Circuit.²⁹⁷ Yet the Court's opinion focuses almost exclusively on the Ninth Circuit.

The Court's inattention to the Commission can be explained partly by the unusually bright line that the court of appeals drew between the "legal standard" it said it was applying (in its subheading A) and the "substantial evidence" it evaluated (in its subheading B).²⁹⁸ The Commission had pointed out to the Ninth Circuit that "almost all of *CDA*'s argument rests on *CDA*'s disagreement with the Commission's fact finding regarding the existence and effect of the restraints condemned," and this fact finding was entitled to highly deferential "substantial evidence" review.²⁹⁹ Although the Commission won the war in the Ninth Circuit, it lost this important little battle. The Supreme Court majority blithely noted that the court of appeals had "treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions," and said it would limit itself to deciding that "the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate."³⁰⁰

²⁹⁶ *Id.* at 1617.

²⁹⁷ *E.g.*, *CDA* Supreme Court Brief, *supra* note 104, at 42–44; *CDA* Supreme Court Reply Brief, *supra* note 64, at 14.

²⁹⁸ 128 F.3d at 726, 728.

²⁹⁹ SG Brief, *supra* note 64, at 29–30.

³⁰⁰ 119 S. Ct. at 1612.

By declaring that it was considering only a legal issue, the Court was freed from the normal obligation to examine the Commission's findings of fact and the evidence supporting them. Under *Chevron*, scrutiny of a legal issue usually would send a court back to examine whether the agency had made a reasonable interpretation of an ambiguous statute, but the SG never claimed *Chevron* deference for the Commission's substantive determination (unlike its jurisdictional decision). This failure is not surprising, since the questions presented to the Court did not seem to raise the kind of classic issue of statutory interpretation for which *Chevron* is applied.³⁰¹ The Commission thus benefited from neither "substantial evidence" nor *Chevron* deference. (In fact, the Supreme Court spent much of its opinion discussing the nature and likely effect of CDA's restrictions, which are factual issues to which a "substantial evidence" standard should have been applied.³⁰²)

The Ninth Circuit, which is famous for having problems in the Supreme Court, somewhat invited this scrutiny by attempting to divide law from fact. A Supreme Court that decides a minute percentage of federal cases may at times act more as a manager of lower courts than as a simple group of judges deciding a discrete case. Professor Strauss has explained that a managerial Supreme Court would supervise the courts of appeals to assure itself that key rules have been understood, and not worry about the more particularized application of those rules.³⁰³ A Supreme Court as manager might care more about whether the Ninth Circuit is properly doing its job than about the particular intersection of fact and law in this dispute, particularly where the Ninth Circuit has conveniently identified a major disagreement as an issue of law.

A managerial Supreme Court ought to be careful before criticizing a court of appeals for giving short shrift to an argument. The problem in *CDA* was that, without reading the briefs at the Commission and Ninth Circuit levels, the Court might not have appreciated (and did not appreciate) the novelty of the justifications *CDA* was advancing. The acute irony in this case is that the Ninth Circuit, having been chastised by the Supreme Court for not spending enough time addressing *CDA*'s justifi-

³⁰¹ See *supra* note 41.

³⁰² See, e.g., *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 42 (1987); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 739 (1945) ("The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." (citations omitted)); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1385-86 (7th Cir. 1986).

³⁰³ Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-22 (1987).

cations, now confronts a request by CDA for briefing on some of those justifications precisely because they were not briefed before.

In the future, it seems clear that Commission decisions will avoid the term "quick look." Also clear is that any court of appeals that learns the lessons of *CDA* will avoid forced divisions of law and fact. Any sliding scale requires that the underlying facts and the intensity of review be looked at simultaneously. This may be hard to accomplish in a jury trial, but it plays to the Commission's unique role as an expert adjudicator. One hopes that the next time an unusually accomplished FTC Commissioner writes a major opinion that leads to Supreme Court review, the Commission opinion will not be oddly absent from the Court's opinion.

H. THE SLIDING SCALE: A FINAL COMMENT

The opinion and the experience of *CDA* have cautioned against the mischief that can be caused by unthinking reliance on formulas. The Court's opinion is an invitation to think, to learn, and to apply that learning.³⁰⁴

One has to worry that the sliding scale may sound better in theory than it proves in practice. As early experience with the rule of reason showed, if everything is relevant, nothing is dispositive. Decision formulas have appeal both as a discipline to analysis and as roadmaps for litigation. It is important for all concerned with the antitrust system that many cases be capable of prompt resolution—and of being litigated practicably in the courts as well as the Commission.

³⁰⁴ Many commentators have advocated sliding scales of one form or another. See, e.g., *supra* note 200; 7 PHILLIP E. AREEDA, *ANTITRUST LAW* ch. 15 (1986 & Supp. (with Herbert Hovenkamp)); Stephen Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 *ANTITRUST L.J.* 339, 348–50 (1991); Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 *Geo. L.J.* 165 (1988); cf. Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 *CALIF. L. REV.* 893, 905–08 & nn.70–71 (1987) (merit in a market power but not a market share screen; market power should be inferable from conduct). Two of the more recent helpful contributions to thinking about these issues are C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 *ANTITRUST L.J.* 41 (1999), and Robert H. Lande & Howard P. Marvel, *Manipulating the Rules of Competition: A Third General Category of Collusion* (unpublished manuscript on file with author).

Subsequent to the drafting of this article, the FTC and the Antitrust Division issued for comment Draft Antitrust Guidelines for Collaborations Among Competitors (Oct. 1, 1999) <<http://www.ftc.gov/os/1999/9910/jointventureguidelines.htm>>. Those draft Guidelines retain a prominent role for the per se rule and a version of the rule of reason that can be applied "without a detailed market analysis." *Id.* § 3.2–3. The draft has attracted considerable attention and engendered some controversy. The antitrust agencies will have to review with care the comments they receive as they consider whether the lines they are drawing are sufficiently clear and helpful.

Perhaps the ultimate irony of *CDA* is that litigants and lower courts struggling to make the sliding scale operational may look to Justice Breyer's dissenting opinion. He agreed with the majority that antitrust should employ a sliding scale, which means that the Court is unanimous on that point. But he explained that he would break the ultimate question (whether restraints are anticompetitive) "into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?"³⁰⁵

If we are not to ask whether restraints are "inherently suspect"; if we are not to ask whether restraints merit a "quick look" (and I cannot imagine that the FTC will soon employ the term in an adjudicated opinion³⁰⁶); if we are not to ask merely whether or not a restraint is per se illegal; we must ask *something*. Justice Breyer's four questions may well prove to be that something. It is noteworthy that he listed market power last. In asking only whether there is "sufficient market power to make a difference," he echoed the Commission itself:

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined. We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed.³⁰⁷

Where the consequences are clear or efficiencies are lacking, a more rudimentary examination—well short of the Full Monty—should prove sufficient.

³⁰⁵ 119 S. Ct. at 1618 (Breyer, J., dissenting).

³⁰⁶ Although the FTC/DOJ Draft Antitrust Guidelines for Collaborations Among Competitors, *supra* note 304, retain a version of the rule of reason that can be applied "without a detailed market analysis," the term "quick look" is conspicuously absent. *But cf.* Robert Pitofsky, FTC Chairman, Joint Venture Guidelines: Views from One of the Drafters, Remarks Before ABA Section of Antitrust Law at 4 (Nov. 11–12, 1999) (draft Guidelines reject an absolute market power screen "for purposes of quick look or for rule of reason treatment") <<http://www.ftc.gov/speeches/pitofsky/jvg991111.htm>>.

³⁰⁷ 121 F.T.C. at 311.

